Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FRANK W. BUGRYN, JR., MARY DUDKO, MICHAEL DUDKO AND JOHN BUGRYN,

Petitioners,

v.

CITY OF BRISTOL, PLANNING COMMISSION OF THE CITY OF BRISTOL AND THE BRISTOL DEVELOPMENT AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When a municipality exercises its condemnation authority in such a manner as to directly benefit a specific and identifiable private interest, do the Fifth and Fourteenth Amendments to the United States Constitution require the application of a heightened standard of review in determining whether the condemnation is being carried out for a valid public use?

LIST OF PARTIES AND AFFILIATES

The names of all parties to the proceedings before the Connecticut Appellate Court appear in the caption of the case. Bristol is a city in the state of Connecticut. There are no corporate petitioners.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully request that a writ of certiorari issue to review the judgment of the Connecticut Appellate Court.

OPINIONS BELOW

The order of the Connecticut Supreme Court denying the petitioners' petition for certification was issued on June 7, 2001, and is reported at 256 Conn. 927, ___ A.2d ___ (2001). It is reprinted in the appendix to this petition ("Pet. App.") at 48.

The opinion of the Connecticut Appellate Court is reported at 63 Conn. App. 98, 774 A.2d 1042 (2001). It is reprinted in the appendix to this petition at Pet. App. 1-20.

The opinion of the Connecticut Superior Court (Kremski, J.T.R.), dated January 31, 2000, is unreported. It is reprinted in the appendix to this petition at Pet. App. 21-47.

JURISDICTION

The Connecticut Supreme Court denied the petitioners' petition for certification on June 7, 2001. The

Connecticut Appellate Court entered judgment on April 24, 2001.[1]

This Court has jurisdiction to review the judgment of the Connecticut Appellate Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of the Takings Clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND V.

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[1] Pursuant to Section 71-1 of the Connecticut Rules of Appellate Procedure, judgment automatically entered on April 24, 2001, the date on which the opinion of the Connecticut Appellate Court appeared in the *Connecticut Law Journal*.

The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND XIV, § 1.

STATEMENT OF THE CASE

The petitioners are four[2] elderly individuals who own two residential properties in Bristol, Connecticut.[3] Pet. App. 3, 23 n.2. Beginning in October of 1996, the respondent city of Bristol ("city") had a series of meetings and discussions with the petitioners regarding the voluntary sale of the petitioners' properties[4] to the city. *Id.* at 23 n.5. The purpose of these discussions was to allow the city to acquire the properties for use in the development

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[2] The fifth plaintiff, Nellie Fillipetti, is not a party to this Petition.

[3] The facts set forth below are drawn from the opinions of the Connecticut Appellate Court and the Connecticut Superior Court.

[4] The properties are located at 269 Middle Street and 299 Middle Street in Bristol. *Id.* at 4 n.3.

of the Southeast Bristol Mini-Industrial Park. *Id.* at 4. At each of those meetings, the petitioners stated their unequivocal lack of interest in selling their homes. *Id.* at 23 n.5. On May 15, 1998, the city tended its final settlement offers to the petitioners, which duly were refused. *Id.* at 23-24 n.5.

On May 21, 1998, the petitioners filed an action in the Connecticut Superior Court ("the trial court") seeking temporary and permanent injunctive relief to restrain the respondents from acquiring the properties through eminent domain. *Id.* at 4. On March 25, 1999, the respondent Bristol Development Authority ("BDA") unanimously adopted the plan to acquire the properties as a part of the overall industrial park plan, and the Bristol city council unanimously voted to acquire the properties through condemnation. *Id.*

On May 25, 1999, after the failure of court-sponsored mediation between the parties, the city initiated formal condemnation proceedings by filing two statements of compensation for the properties with the trial court.[5] *Id.* at 5. On June 4, 1999, the petitioners filed motions for temporary and permanent injunctive relief in the two condemnation cases to restrain the respondents from taking any further action concerning their properties. *Id.* The city subsequently served notice of the taking by eminent domain and filed the required record of notice with the trial court clerk. *Id.* The trial court then consolidated the

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[5] The statements reflected that the city had deposited $1,200,000 as compensation for the 299 Middle Street property, and $90,000 as compensation for the 269 Middle Street property with the trial court clerk. *Id.* at 24-25 n.8.

three pending proceedings related to this dispute.[6] *Id.* at 5-6.

The trial court held hearings on the three motions in late September and early October of 1999. *Id.* at 27 n.15. At those hearings, the petitioners claimed that they were entitled to injunctive relief for five reasons: (1) the city's acquisition of their properties was not for a valid public use; (2) the acquisition was not for the purposes stated in the notice of May 25, 1999; (3) the acquisition of all of the properties was not necessary to effectuate the industrial park plan; (4) the city failed to make reasonable efforts to negotiate; and (5) the petitioners resided on the properties and were elderly. *Id.* at 22-23. The first of these claims, namely, that the city's acquisition of their properties was not for a valid public use, was the main focus of the petitioners' federal constitutional arguments. The petitioners alleged that the city had formulated the industrial park plan for the primary purpose of keeping a particular private company, Yarde Metals, in Bristol, and that the proposed condemnation therefore would directly benefit a specific private entity, Yarde Metals. As such, the petitioners argued that the condemnation was not for a valid public use. *Id.* at 33-36.

The trial court rejected this contention. The court concluded that

> [a]lthough the city had numerous discussions with and made plans to have Yarde Metals as an

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[6] The three actions were: (1) the petitioners' May 21, 1998, action for injunctive relief; (2) the condemnation proceedings for 299 Middle Street; and (3) the condemnation proceedings for 269 Middle Street. *Id.* at 6 n.6.

> anchor tenant in the proposed industrial park, no agreement or contract, written or oral, was made with Yarde Metals. Furthermore, and more telling, the evidence shows the city plans on developing the industrial park whether or not Yarde Metals indeed becomes a tenant. This court notes that even if Yarde Metals becomes the hoped-for anchor tenant, it will have to comply with the developmental plan as approved by the [sic] Bristol's Developmental Board and City Council. Therefore, this court finds that the homeowners' claims of constitutional right violations are without merit.

Id. at 35. The trial court then considered and rejected the petitioners' other claims, and denied their requests for injunctive relief. *Id.* at 47.

The Connecticut Appellate Court affirmed the trial court's decision. *Bugryn v. Bristol*, 63 Conn. App. 98, 774 A.2d 1042 (2001). The petitioners raised two federal constitutional issues before the Appellate Court: (1) that the condemnation violated their rights under the Fifth Amendment because it conferred a "substantial benefit upon [a] private party"; and (2) that the trial court improperly failed to apply a heightened level of scrutiny to their claim that the condemnation would confer such a benefit.[7] Pet. App. at 6-7 n.7. As to the first issue, the

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[7] The petitioners also raised three state law claims: (1) that the respondents acted in excess of the authority conferred on them by the Economic Development and Manufacturing Assistance Act, Conn. Gen. Stat. § 32-220 et seq.; (2) that the defendants acted unreasonably, in bad faith, or in abuse of their power by seeking to acquire all of the properties for the industrial park plan; and (3) that the trial court improperly

Appellate Court concluded that the trial court's evaluation of the testimony concerning Yarde Metals, and the city's plan to develop the industrial park, was reasonably supported by the record. *Id.* at 8-9. The Court therefore affirmed the trial court's finding of a valid public use. *Id.* at 9. As to the second issue, the Court simply noted, in a footnote, that

> [t]he [petitioners] have failed to cite any Connecticut authority to support this argument, and, to the contrary, our [Connecticut] Supreme Court *has not applied a heightened standard of review* in previous disputes concerning the nature of a taking, *even where the resale of the subject property to private entities is contemplated.* See *Fishman v. Stamford*, 159 Conn. 116, 267 A.2d 443, *cert. denied*, 399 U.S. 905, 90 S. Ct. 2197, 26 L. Ed. 2d 560 (1970) (land condemned under redevelopment plan later sold to church); *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 104 A.2d 365 (1954) (land condemned under redevelopment plan offered for sale or lease at fair value to redevelopers).

Id. at 7 n.7 (emphasis added). The Appellate Court therefore held that heightened scrutiny was not a requirement in this case.

The petitioners subsequently filed a petition for certification – limited to the heightened scrutiny issue – with the Connecticut Supreme Court. The Connecticut

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admitted certain testimony concerning the fair market value of their properties. Pet. App. at 3-4. Those claims are not at issue in this Petition.

Supreme Court denied the petition on June 7, 2001. *Id.* at 48.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CONNECTICUT APPELLATE COURT THAT A HEIGHTENED DEGREE OF SCRUTINY IS NOT REQUIRED UNDER THE FIFTH AMENDMENT WHEN A PROPOSED CONDEMNATION WILL DIRECTLY BENEFIT A SPECIFIC AND IDENTIFIABLE PRIVATE ENTITY CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER STATE COURTS OF LAST RESORT.

This case presents this Court with an opportunity to resolve a dispute between several state courts of last resort as to the proper level of scrutiny to which trial judges should subject municipal claims of public use if the proposed taking will result in a direct benefit to a specific and identifiable private entity. The highest courts of Michigan and Delaware have held that the United States Constitution mandates that such claims be subjected to a heightened degree of scrutiny. However, several other courts, including, in the present case, the Connecticut Appellate Court, have taken the opposite position. A definitive answer by this Court as to the degree of scrutiny required by the Fifth Amendment will resolve this split in authority, and will serve to clarify this Court's Takings Clause jurisprudence.

It is black-letter law that "[t]he Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment . . . prohibits the government from taking private property for public use without just

compensation." *Palazzolo v. Rhode Island*, 533 U.S. ___, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592 (2001) (citation omitted). Although this Court has defined the term "public use" as being "coterminous with the scope of a sovereign's police powers"; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984); and has therefore generally been deferential to municipal claims of public use, this Court also has noted that in evaluating such claims "each case must turn on its own facts." *Id.* at 239. While this Court has decided a number of cases – including the *Hawaii Housing Authority* case – which involve a taking of one sort or another with *some* benefit to a private entity, none of those opinions expressly announce the proper constitutional degree of scrutiny that courts should apply in future cases involving a *direct* benefit to a specific and identifiable private entity. See, e.g., *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992).

In the absence of a definitive holding by this Court, two lines of cases have arisen. The first holds that "where a proposed government action confers a benefit on a private interest, unless that benefit is merely incidental, a reviewing court will inspect with heightened scrutiny the assertion by the governmental entity of a public purpose." *City of Lansing v. Edward Rose Realty*, 442 Mich. 626, 639, 502 N.W.2d 638 (1993). In the *Lansing* case, the Michigan Supreme Court considered a Lansing city ordinance that provided for "mandatory access to private property by the grantee of a city franchise for the provision of

cable television services." *Id.* at 627. If any private property owner refused to provide such access to the franchisee, the ordinance allowed the city to institute condemnation proceedings against the property owner. *Id.* at 628. After first noting that the case raised questions under both the Michigan and United States Constitutions; *id.* at 631; the Michigan Supreme Court pointed out that, pursuant to the ordinance, a private entity, namely, the cable television franchisee, would "receive more than an incidental benefit." *Id.* at 639. The court therefore held that application of a heightened degree of scrutiny was warranted in order to protect the constitutional rights of private property owners, and, pursuant to that heightened standard of review, invalidated the ordinance because the benefit to the cable franchisee "predominate[d] over the asserted public benefits." *Id.* at 644.

The holding of *Lansing* echoed that of an earlier Michigan Supreme Court case, *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981). The issue in *Poletown* was the constitutionality of a set of Michigan statutes, Mich. Stat. Ann. § 5.3520, et seq., which authorized the municipal condemnation of private property in order to allow the expansion of privately-owned industrial and commercial facilities. *Id.* at 634. Although the Michigan Supreme Court ultimately upheld the statute (based largely on the devastating economic blight afflicting Detroit at that time), it did so only after issuing a significant cautionary proviso:

> Our determination that this project falls within the public purpose, as stated by the Legislature, does not mean that every condemnation proposed by an economic development corporation

> will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefitted. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.

Id. at 634-35.[8]

The emphatic language of the *Poletown* case has not fallen on deaf judicial ears. Rather, it has led several other courts to adopt the heightened standard of review favored by the Michigan Supreme Court. The most notable of the *Poletown* progeny is the decision of the Delaware Supreme Court in *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d 227 (Del. 1987). The *Wilmington* case dealt with a decision by the Wilmington Parking Authority (WPA) to condemn a piece of property

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[8] The Michigan Supreme Court recently has reaffirmed its commitment to heightened scrutiny in condemnation cases involving a direct benefit to specific and identifiable private interest. See *Tolksdorf v. Griffith*, 464 Mich. 1, 9, 626 N.W.2d 123 (2001).

in order to build a public parking garage on a small portion of the condemned land. The rights to the remainder of the property were to be conveyed to a private newspaper company, Gannett Co., Inc., which operated a facility on the adjacent block. *Id.* at 229.

The Delaware Supreme Court, relying expressly on *Poletown*, held that the condemnation was not for a valid public use, as required by the Delaware and U.S. Constitutions, and therefore fell outside the WPA's statutory condemnation authority. *Id.* at 234-35. In fact, the *Wilmington* opinion refined the *Poletown* test by noting that a trial court should "examine the 'underlying purpose' of the condemning authority in proposing a project as well as the purpose of the project itself." *Id.* at 231. The Court held such a searching examination to be necessary because municipal claims of public use based on economic necessity "could be carried to dangerous extremes. . . . " *Id.*

The decision of the Indiana Supreme Court in *Hawley v. South Bend, Dept. of Redevelopment*, 270 Ind. 109, 383 N.E.2d 333 (1978), also is worthy of note. *Hawley* concerned a challenge to a municipal condemnation of land in South Bend that was carried out "with a view toward redevelopment by private investment." *Id.* at 111. Although the Indiana Supreme Court ultimately upheld the condemnation, it did state that "the inquiry of the courts . . . is *not only the use which the City purports to want to make of the property to be acquired,* but also *all of the surrounding facts and circumstances tending to show what is the actual, principal and real use to be made of the property.*" *Id.* at 120 (emphasis added). The Court never actually employed the term "heightened scrutiny" in its opinion,

but, to paraphrase the Immortal Bard, heightened scrutiny by any other name would smell as sweet. Certainly, the Indiana Supreme Court, in *Hawley*, seemed willing to look beyond mere municipal protestations of valid public use in order to ascertain the "actual, principal and real use" of the condemned property.[9]

Although a number of state and federal cases have applied a deferential standard of review in condemnation cases involving some benefit to a private entity, the petitioners have found only three cases that have *expressly*

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[9] Although Michigan and Delaware are the only state courts of last resort expressly to adopt the heightened scrutiny standard, the New Jersey Supreme Court has favorable *dicta* on the subject. In *City of Atlantic City v. Cynwyd Investments*, 148 N.J. 55, 689 A.2d 712 (1997), the New Jersey Supreme Court approvingly quoted the language of the *Poletown* and *Wilmington* cases in order to emphasize that the role of the judiciary in condemnation cases often is to provide a check on "one of the most awesome powers of government." *Id.* at 73. Although the actual issue in *Cynwyd* involved Atlantic City's compliance with a number of the procedural requirements of New Jersey's condemnation statutes, the Court, after quoting *Poletown* and *Wilmington*, cautioned future condemnors that "[t]he power of eminent domain must always be exercised in the public interest and without favor to private interests." *Id.*

Following the issuance of *Cynwyd*, the New Jersey Appellate Division of the Superior Court expressly held that the federal constitution requires the application of heightened scrutiny in cases involving a substantial benefit to a private entity. *Township of West Orange v. 769 Associates, LLC*, 341 N.J. Super. 580, 583-84, 775 A.2d 657 (N.J. App. Div. 2001). The Appellate Division issued the *West Orange* opinion on July 2, 2001. As of the date of this Petition, the New Jersey Supreme Court has not offered any further guidance as to its position on the issue.

considered and rejected heightened scrutiny. One of these, of course, is the decision of the Connecticut Appellate Court in the present case. See *Bugryn*, 63 Conn. App. at 102, n.7. The other two are *AMSAT Cable Ltd. v. Cablevision Ltd. Partnership*, 6 F.3d 867, 875 (2nd Cir. 1993), and *Minneapolis Comm. Dev. Agency v. Opus Northwest, LLC*, 582 N.W.2d 596, 599 (Minn. App.), *review denied*, 1998 Minn. LEXIS 779 (1998).

In *AMSAT Cable*, the plaintiffs claimed that a Connecticut statute that guaranteed cable television companies access to apartment complexes amounted to an unconstitutional taking because its primary purpose was to benefit privately-owned cable companies. *AMSAT Cable*, 6 F.3d at 875. The Second Circuit not only rejected the plaintiffs' claim, but also expressly refused the plaintiffs' request that it adopt the heightened scrutiny standard employed by the Michigan Supreme Court in *Lansing*. The Second Circuit did so based on its reading of this Court's opinion in *Hawaii Housing Authority*, which the Second Circuit viewed as mandating a more deferential standard.[10] *Id.*

The Minnesota Court of Appeals reached the same result in the *Minneapolis* case, which concerned an attempt to condemn two pieces of property in downtown Minneapolis in order to build "a mid-priced retail store, parking complex, extended skyway access, and an office

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[10] The Second Circuit also incorrectly characterized the *Lansing* test as arising solely under the Michigan Constitution. *AMSAT Cable*, 6 F.3d at 875. However, as discussed *supra*, *Lansing* clearly refers to both the Michigan and U.S. Constitutions. *City of Lansing*, 442 Mich. at 631.

building. . . . " *Minneapolis*, 582 N.W.2d at 598. The Minnesota Court of Appeals noted that the *Poletown* line of cases was "out of touch with the national trend[,]" and that prior Minnesota cases had adopted a deferential standard of review in condemnation cases. The Court therefore refused to apply heightened scrutiny.[11] *Id.* at 599.

The conflict between these two schools of thought presents this Court with the opportunity to clarify the meaning of its holding in *Hawaii Housing Authority* with respect to cases involving a direct benefit to a specific and identifiable private entity. The petitioners urge the Court to follow the Michigan and Delaware courts and hold that the Takings Clause requires the application of heightened level of scrutiny in such situations. There are several reasons for such a course of action.

First, adoption of heightened scrutiny would be in keeping with other facets of this Court's constitutional jurisprudence. In the area of equal protection, for example, this Court has long employed varying levels of scrutiny depending on the nature of the claim advanced by the petitioner. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) (violations

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[11] It is not clear from the *Minneapolis* opinion whether the Minnesota Court of Appeals decided the issue based on the United States Constitution, or the Minnesota Constitution, or both. However, the decision of the Minnesota Supreme Court on which the *Minneapolis* opinion primarily relies, *Duluth v. State*, 390 N.W.2d 757 (Minn. 1986), expressly discusses the United States Constitution in its analysis of the public use requirement. *Id.* at 762.

of equal protection based on race subject to strict scrutiny); *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (violations of equal protection based on gender subject to intermediate scrutiny); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441-42, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (violations of equal protection based on mental retardation subject to rational basis review). This Court also has adopted a higher degree of scrutiny in cases that involve the alleged violation of a fundamental right or liberty. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 2d 1655 (1942) (the right to have children). These cases embody this Court's sensible recognition of the fact that gradations exist in the level of constitutional scrutiny to which a person is entitled depending on the nature of the alleged constitutional violation. Therefore, courts examine certain legislative actions – e.g., those that classify based on race, or those that impinge a fundamental right – very closely, while subjecting certain others – e.g., classifications based on profession – to a less exacting examination.

This logic should be applied to the present case. Certainly, not every municipal decision to condemn property requires heightened scrutiny – indeed, the petitioners freely concede that most condemnations do not. However, where a proposed condemnation will result in a direct benefit to a specific and identifiable private entity, a trial court cannot fulfill its constitutional duty to ensure that the property is being taken for a truly public use without a more thorough and searching examination. Cases in which this type of direct benefit exists present the significant possibility of allowing private enterprise

to take privately-owned property while hiding behind the thin veil of municipal power – a charade that the Constitution cannot tolerate. Establishing such a two-tiered system of review in Takings Clause cases simply is the logical extension of this Court's well-settled equal protection and due process jurisprudence, and will guard against this potential evil.

Second, the rapid pace of economic development, and the attendant appetite for land to facilitate that development, also warrants the adoption of heightened scrutiny. In our haste to build and grow, to create jobs and opportunities for capital investment, courts should not lose sight of the fact that land that is condemned to further economic growth has a condemnee as well as a condemnor – and that the burden of such growth often is placed on the shoulders of the former. As Chief Justice Rehnquist has noted, "[o]ne of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Here, the burden of economic growth in Bristol has been placed, in large measure, on the shoulders of the Petitioners. Economic growth is often desirable, but, as the Michigan Supreme Court warned, "[that] does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base." *Poletown*, 410 Mich. at 634. In order to ensure that we do not allow the power to condemn private property to become a tool of private

entities in the name of jobs and industrial expansion, this Court should require a heightened standard of scrutiny in cases involving a direct benefit to a specific and identifiable private entity.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that a writ of certiorari issue to review the judgment of the Connecticut Appellate Court.

Respectfully submitted,

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CITY OF BRISTOL *v.* FRANK W. BUGRYN, JR., ET AL.

CITY OF BRISTOL *v.* FRANK W. BUGRYN, JR.
(AC 20511)

Lavery, C. J., and Foti and Peters, Js.

Syllabus

The plaintiffs in the first case, who owned certain property in the city of Bristol, appealed to this court from the trial court's denial of their requests for injunctive relief to prevent the defendants in the first case, the city and certain municipal agencies, from taking further action to acquire the plaintiffs' properties under the power of eminent domain. They claimed, inter alia, that the underlying purpose of the city's plan to create an industrial park was to retain a particular manufacturer within the city and that, therefore, the taking was unconstitutional in that it impermissibly benefited a private entity. *Held:*

1. The plaintiffs' claim that the taking of their property violated their constitutional rights was unavailing in light of the trial court's determination that the industrial park constituted a public use; that court's factual finding that the purpose of the taking was to create an industrial park was amply supported by the evidence, and the possibility that the manufacturer would

become an anchor tenant in the park did not undermine that finding.

2. Contrary to the claim made by the plaintiffs, the trial court had ample evidence before it to support its determination that the defendants did not exceed the broad authority conferred on them by the Economic Development and Manufacturing Assistance Act (§ 32-220 et seq.).

3. The plaintiffs could not prevail on their challenge to the trial court's finding that the defendants did not act unreasonably, in bad faith or in abuse of their power in seeking to acquire all of the property in dispute; the record revealed that all of that property was necessary to the implementation of the industrial park plan.

4. The plaintiff's failed to demonstrate that they were prejudiced by the trial court's admission of evidence concerning the fair market value of their properties and prior mediation between the parties; those evidentiary matters were not material to that court's decision.

Argued February 22 – officially released April 24, 2001

Procedural History

Action, in the first case, to enjoin the defendants from taking further action to acquire certain of the plaintiffs' real property, and actions, in the second and third cases, to take certain real property by eminent domain, brought to the Superior Court in the judicial district of New Britain, where the cases were consolidated; thereafter, the defendants in the second and third cases filed motions to enjoin the plaintiff in the second and third cases, named defendant in the first case, from taking possession of the property; subsequently, the matter was tried to the court,

Hon. Julius J. Kremski, judge trial referee; judgments denying the injunctions in each case, from which the plaintiffs in the first case, defendants in the second and third cases, filed a consolidated appeal with this court. *Affirmed.*

Bridget C. Gallagher, with whom, on the brief, was *Anthony A. Denorfia*, for the appellants (plaintiffs in the first case, defendants in the second and third cases).

Brian T. Henebry, for the appellees (defendants in the first case, plaintiff in the second and third cases).

Opinion

FOTI, J. The plaintiffs,[1] owners of certain parcels of land in the city of Bristol, appeal from the trial court's judgments denying their requests for injunctive relief against the defendants.[2] The plaintiffs sought to enjoin the defendants from exercising the state's power of eminent domain to condemn their properties as part of a plan to construct an industrial park. The plaintiffs claim that the court improperly (1) concluded that the defendants did not violate the plaintiffs' state and federal constitutional rights, (2) concluded that the defendants did not act in excess of the authority conferred on them by the

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[1] The plaintiffs in the first case, defendants in the second and third cases, are Frank W. Bugryn, Jr., Nellie Fillipetti, Mary Dudko, Michael Dudko and John Bugryn. For convenience, we refer in this opinion to the property owners as the plaintiffs.

[2] The defendants in the first case are the city of Bristol, the Bristol development authority and the planning commission of the city of Bristol. The city is the plaintiff in the second and third cases. We refer to the defendants in the first case as the defendants in this opinion.

Economic Development and Manufacturing Assistance Act, General Statutes § 32-220 et seq., (3) concluded that the defendants did not act unreasonably, in bad faith or in abuse of their power in seeking to acquire all of the subject property by eminent domain and (4) prejudiced their case by admitting into evidence certain testimony concerning the fair market value of the property and mediation efforts between the parties. We affirm the judgments of the trial court.

The following facts underlie the plaintiffs' claims. As early at 1996, the defendant city of Bristol (city) began developing a plan to create the Southeast Bristol Mini-Industrial Park. Various city entities contacted the plaintiffs in an attempt to achieve the voluntary sale to the city of property owned by the plaintiffs to satisfy the plan's requirements.[3] The plaintiffs repeatedly indicated their lack of interest in selling their property. In May, 1998, the city made final settlement offers to the plaintiffs. On May 21, 1998, the plaintiffs filed the present action seeking temporary and permanent injunctive relief to restrain the defendants from acquiring their properties by eminent domain. On March 25, 1999, the defendant development authority of the city of Bristol unanimously adopted the plan to acquire the subject property as part of the industrial park plan, and the members of the city council of the city of Bristol unanimously voted to acquire the plaintiffs' property through condemnation. The commissioner of the Connecticut department of economic and community development subsequently approved the development

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[3] The subject properties are located at 269 Middle Street and 299 Middle Street in Bristol.

plan. The court granted the city's application for mediation, and the parties attended mediation proceedings before a court-appointed mediator in April, 1999; those efforts did not resolve the dispute.[4] On May 25, 1999, the city filed two statements of compensation for the properties with the Superior Court.

On June 4, 1999, the plaintiffs filed motions for temporary and permanent injunctive relief in the two condemnation cases to restrain the defendants from taking further action concerning their property. The city served notice of the taking by eminent domain, pursuant to General Statutes § 8-129, and subsequently filed the required record of notice with the clerk of the Superior Court.[5] The court consolidated the three pending

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[4] The mediator's report reflects that the plaintiffs would not accept fair offers of compensation because they did not want to leave their homes.

[5] Pursuant to General Statutes § 32-224 (g), the implementing agency may condemn property in accordance with sections 8-128 and 8-133. General Statutes § 8-129 provides in relevant part: "The redevelopment agency shall determine the compensation to be paid to the persons entitled thereto for such real property and shall file a statement of compensation, containing a description of the property to be taken and the names of all persons having a record interest therein and setting forth the amount of such compensation, and a deposit as provided in 8-130, with the clerk of the superior court for the judicial district in which the property affected is located. Upon filing such statement of compensation and deposit, the redevelopment agency shall forthwith cause to be recorded, in the office of the town clerk of each town in which the property is located, a copy of such statement of compensation, such recording to have the same effect as and to be treated the same as the recording of a lis pendens, and shall forthwith give

proceedings related to this dispute.[6] With that action pending, the defendants properly refrained from taking any further steps to acquire the subject property. The plaintiffs brought the present appeal after the court denied the injunctive relief.

I

The plaintiffs first claim that the court improperly failed to conclude that the defendants violated the plaintiffs' state and federal constitutional rights. We disagree.

The plaintiffs claim that "the underlying purpose of the subject condemnation was to retain a particular manufacturer, Yarde Metals, within the city of Bristol. The evidence presented clearly supports a conclusion that the condemnation would confer a substantial benefit upon said private party." although the plaintiffs state this claim in constitutional terms, it arises out of the court's factual determinations.[7] "It is fundamental that as an attribute of

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notice, as hereinafter provided, to each person appearing of record as an owner of property affected thereby and to each person appearing of record as a holder of any mortgage, lien, assessment or other encumbrance on such property or interest therein. . . . "

[6] The first matter was the plaintiffs' action for injunctive relief, the second matter was the condemnation proceeding filed by the city for 299 Middle Street and the third matter was the condemnation proceeding filed by the city for 269 Middle Street.

[7] The plaintiffs claim that because a specific and identifiable private interest would benefit because of the taking by eminent domain, the taking violated their rights under the fifth amendment to the United States constitution, made

sovereignty, the state government or any properly designated agency thereof may take private property under its power of eminent domain if the taking is for a public use and if just compensation is paid therefor." *Gohld Realty Co.* v. *Hartford*, 141 Conn. 135, 141, 104 A.2d 365 (1954). We must ascertain whether the courts' factual finding that the industrial park constitutes a public use and that this taking was not to benefit a private entity was clearly erroneous.

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applicable to the states through the fourteenth amendment to the United States constitution. The fifth amendment to the United States constitution provides in relevant part that private property shall not "be taken for public use, without just compensation." They also claim that it violated their rights under the constitution of Connecticut, article first, § 11, which provides: "The property of no person shall be taken for public use, without just compensation therefor."

The plaintiffs further claim that the court improperly failed to apply a heightened level of scrutiny to their claim. The plaintiffs argue, in this regard, that courts should employ heightened scrutiny "[w]here condemnation authority is exercised in a way that benefits a specific and identifiable private interest" to ascertain whether the public interest is the predominant interest being advanced. The plaintiffs have failed to cite any Connecticut authority to support this argument, and, to the contrary, our Supreme Court has not applied a heightened standard of review in previous disputes concerning the nature of a taking, even where the resale of the subject property to private entities is contemplated. See *Fishman v. Stamford*, 159 Conn. 116, 267 A.2d 443, cert. denied, 399 U.S. 905, 90 S. Ct. 2197, 26 L. Ed. 2d 560 (1970) (land condemned under redevelopment plan later sold to church); *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 104 A.2d 365 (1954) (land condemned under redevelopment plan offered for sale or lease at fair value to redevelopers).

"An appellate court's review of a trial court's decision is circumscribed by the appropriate standard of review. As we have often stated: The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous." (Internal quotation marks omitted.) *Powers* v. *Olson*, 252 Conn. 98, 104-105, 742 A.2d 799 (2000). "The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Melillo* v. *New Haven*, 249 Conn. 138, 151, 732 A.2d 133 (1999).

The plaintiffs argue that the evidence adduced before the court "establishe[d] a clear chronology of events which supported a finding that the condemnation and contemplated redistribution of the property would benefit a specific and identifiable private interest, Yarde Metals. The trial court erred in failing to make this finding." Our careful review of the record reveals more than ample evidence supporting the court's finding that the city "approached the homeowners with the intention to purchase their properties for the purpose of building an industrial park. Although the city had numerous discussions with and made plans to have Yarde Metals as an

anchor tenant in the proposed industrial park, no agreement or contract, written or oral, was made with Yarde Metals. Furthermore, and more telling, the evidence shows [that] the city plans on developing the industrial park whether or not Yarde Metals indeed becomes a tenant."

The plaintiffs seek to have us reevaluate the evidence, viewing it harmoniously with their theory that the defendants seek to condemn their property primarily to benefit Yarde Metals. Even if the taking would later provide a site for Yarde Metals, a consequence that would be neither undesirable to the defendants nor adverse to the goals that the park plan seeks to achieve, that fact would not support the plaintiffs' claim in light of the ample evidence in the record concerning the plan as a whole. "[W]here the public use which justifies the taking of the area in the first instance exists, an element over which there is no controversy in the present case, that same public purpose continues even though the property is later transferred to private persons." *Broadriver, Inc.* v. *Stamford*, 158 Conn. 522, 533-34, 265 A.2d 75 (1969), cert. denied, 398 U.S. 938, 90 S. Ct. 1841, 26 L. Ed. 2d 270 (1970).

Given the soundness of the court's factual determinations and the fact that it is not disputed that the development of an industrial park constitutes a public use, we can discern no violation of the plaintiffs' constitutional rights.

II

The plaintiffs next claim that the court improperly concluded that the defendants did not exceed the authority conferred on them by the Economic Development and Manufacturing Assistance Act, General Statutes § 32-220 et seq. (act). This claim rests on the plaintiffs' factual argument that the city sought to condemn the plaintiffs' property to prevent "losing Yarde Metals to the town of Southington or the town of Cheshire. . . . " They argue that this purpose behind the taking conflicts with the legislative objectives in the act and that, therefore, the defendants' action is not for a valid public use for purposes of the Act. We disagree.[8]

We first note our standard of review. Under the act, the legislature has vested those agencies authorized to exercise the state's power of eminent domain "to promote the retention and expansion and increase the competitiveness of manufacturing and other economic base businesses." in Connecticut. General Statutes § 32-221. The legislature sought to maintain and to develop the state's manufacturing sector, as well as to maintain and to create the jobs that accompany that sector of the economy. See General Statutes § 32-221. The act permits municipalities to designate implementing agencies to exercise the powers delegated under the act, including the power to condemn property. General Statutes § 32-224 (a). "Such

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[8] We disagree, as well, with the defendants' assertion that the plaintiffs failed to provide us with an adequate record to review this claim. Although the court discussed the issue with relative brevity, we find ample support for the court's conclusion in other portions of its memorandum of decisions.

authority having been reposed in the agency, the agency's decision is conclusive unless, on judicial review, it is found to be unreasonable, or the result of bad faith, or an abuse of the power conferred." *Pet Car Products, Inc.* v. *Barnett*, 150 Conn. 42, 51, 184 A.2d 797 (1962); see also *Graham* v. *Houlihan*, 147 Conn. 321, 328, 160 A.2d 745, cert. denied, 364 U.S. 833, 81 S. Ct. 70, 5 L. Ed. 2d 57 (1960) (question of whether agency properly sought to condemn certain property under redevelopment act primarily matter for redevelopment agency, and decision subject to judicial review only to discover whether agency acted unreasonably, in bad faith or in abuse of its powers).

As we discussed in part I of this opinion, the court's factual finding that the defendants acted for public, not private, purposes finds support in the record. We, likewise, can discern no reason to upset the court's conclusion that the defendants did not violate the statutory authority conferred on them by the act. The legislature intended a broad construction of the provisions of the act. General Statutes § 32-233 (a) provides that "[t]he powers enumerated in sections 32-220 to 32-234, inclusive, shall be interpreted broadly to effectuate the purposes thereof and shall not be construed as a limitation of powers."

The plaintiffs urge us to interpret the act as fostering development of the state's manufacturing sector at the expense of, or in competition with, other states and the international community. In their reply brief, the plaintiffs argue that they "do not dispute that the park plan appears *on its face* to meet the legislative mandate. . . ." (Emphasis in original.) They claim, instead, that they introduced evidence that demonstrated that the defendants' motive, or ulterior purpose, in constructing the

park was to compete with neighboring municipalities and to retain a particular manufacturer, Yarde Metals. Given the evidence supporting the court's factual determinations, however, we have little difficulty concluding that the defendants did not act unreasonably, in bad faith or outside of their statutory authority in developing their plan for an industrial park.

The court had ample evidence before it that refuted the plaintiffs' arguments that the defendants sought to condemn their property primarily to compete with surrounding towns for Yarde Metals, or for any other company.[9] Evidence adduced before the court demonstrated, as well, that the state had recognized the city as an economically disadvantaged community and that the industrial park would serve the public good by creating or retaining manufacturing jobs, creating additional industrial land in the city and increasing the tax base.

In light of the broad powers conferred on the implementing agency under the act and the complex goals sought to be achieved under the act, the court had ample

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[9] For example, the court heard testimony from Jonathan Rosenthal, the executive director of the development authority, as to what types of businesses the city targeted to relocate, and which businesses have already committed to locate, in the park. Rosenthal testified that his office targets and has successfully lured companies from several other states. "[I]it is well established that the evaluation of [a witness'] testimony and credibility are wholly within the province of the trier of fact." (Internal quotation marks omitted.) *Greene* v. *Perry*, 62 Conn. App. 338, 342, ___ A.2d ___ (2001). No evidence demonstrated that the park was even contingent on Yarde Metals' plans.

evidence before it that demonstrated that the condemnations were for a public use as set forth in the act.

III

The plaintiffs next claim that the court improperly failed to find that the defendants acted with unreasonableness, bad faith or in abuse of their power in seeking to acquire all of the subject property by eminent domain. We disagree.

It is well settled that "[t]he determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred." *Gohld Realty Co.* v. *Hartford*, supra, 141 Conn. 146.

The act permits a municipality to designate an implementing agency to exercise the powers conferred under the act. General Statutes § 32-224 (a). Once the agency's development plan is approved in accordance with the act, the agency may "by purchase, lease, exchange or gift acquire or rent real property necessary or appropriate for the project as identified in the development plan. . . ." General Statutes § 32-224 (g). The agency may also "with the approval of the legislative body of the municipality, and in the name of the municipality, condemn . . . any real property *necessary or appropriate for the project as*

identified in the development plan. . . . " (Emphasis added.) General Statutes § 32-224 (g).

As a reviewing court, we are bound to determine whether the court's factual determination that the defendants did not act unreasonably in seeking to acquire all of the plaintiffs' property was clearly erroneous. Our Supreme Court has stated that the appropriate standard in determining whether a certain parcel of land is necessary for purposes of this type of inquiry is whether the taking is "reasonably necessary" given the approved development plan. *West Hartford* v. *Talcott,* 138 Conn. 82, 91, 82 A.2d 351 (1951).

The plaintiffs' claims in this regard are threefold. First, the plaintiffs claim that the defendants gave preferential treatment to another manufacturer whose property is within the project plan area. They claim that the defendants chose not to condemn land owned by an electric company although it lies within the project area. They claim that the defendants intend to build necessary infrastructure for the park on the property of the electric company, but intend to allow the company to retain title to its property. Second, the plaintiffs' claim that the defendants seek to acquire more of the plaintiffs' property than is necessary as part of a plan to intimidate or pressure all of the plaintiffs to sell their property voluntarily. Third, the plaintiffs claim that the defendants' underlying purpose in condemning their properties is to benefit Yarde Metals.

The court rejected the claim that the taking was not necessary. It concluded that no evidence before it demonstrated that the defendants acted with "unreasonableness, bad faith or [in] abuse of their power. . . . "[10]

The arguments advanced by the plaintiffs in this claim once again rest on their interpretation of conflicting evidence before the court. Our review of the record disclosed that the defendants did not seek to condemn the electric company's property because there simply was never any need to do so. Jonathan Rosenthal,[11] the executive director of the development authority, testified that electric company officials had always manifested their willingness to work with the city to develop the park and had expressed their willingness to sell land necessary to accommodate neighbor industries and to enter into co-development agreements with the city in accordance with the city's needs concerning the plan for the park. That evidence belies the plaintiffs' claim that the defendants gave preferential treatment to an adjacent landowner to the extent such evidence would have helped their claim.

The plaintiffs also argue, essentially, that the defendants should have excluded residential properties from the proposal and that the condemnation of their properties was intended solely to benefit Yarde Metals. The record, however, reflects that the subject property was

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[10] Given the appropriately deferential standard of review afforded this type of determination and the fact that court made adequate determinations concerning the factual issues presented in this claim, we reject the defendants' assertion that the record is inadequate for our review of this claim.

[11] See footnote 9.

necessary to the defendants' plan.[12] The plaintiffs' argument is that the defendants could have developed the industrial park without acquiring their land. Again, neither this court nor the trial court can second-guess the decision of the agency or the municipality that adopted the plan. To the extent that the plaintiffs challenge the action on the basis that it was intended solely to benefit Yarde Metals, we addressed that claim in parts I and II of this opinion.

While we recognize that the state should not condemn any more property than is necessary to satisfy the legislative mandate, courts are not well suited to second-guess determinations of this nature. "Where it appears that an honest judgment has been reasonably and fairly exercised after a full hearing, courts should be cautious

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[12] Frank Nicastro, the mayor of the city of Bristol and the chairman of the development authority, testified that although the city council approved the condemnation of forty acres of 299 Middle Street, the defendants sought to condemn only thirty-two acres of the property so that the plaintiffs could retain some of their land. Testimony at trial also established that the defendants sought to condemn the property at 269 Middle Street because omitting this parcel from the overall park plan would cause additional acreage to be taken out of productive use in the park and would cause the park to take on an irregular shape. Testimony also established that the defendants determined that the lot was needed to give the park necessary frontage and visibility for marketing purposes. The defendants also indicated that they were concerned about the risk that the substandard condition of the structures of 269 Middle Street would affect the marketability of the industrial park and that eventually the defendants might have to do grading work on other areas of the park that might necessitate work on this parcel.

about disturbing the decision of the local authority." (Internal quotation marks omitted.) *Graham* v. *Houlihan*, supra, 147 Conn. 329. The defendants justified to the court their decision to acquire the plaintiffs' land as part of their proposed industrial park. Although the plaintiffs are concerned about their parcels of land, the defendants' decisions reflected planning and development concerns regarding the significance of the plaintiff's land to the entire project plan. See *Broadriver, Inc.* v. *Stamford*, supra, 158 Conn. 534.

IV

The plaintiffs next claim that the judgments should be reversed because the court improperly admitted into evidence certain testimony concerning the fair market value of the property and prior mediation between the parties. We disagree.

The plaintiffs originally claimed that the city failed to make reasonable efforts to negotiate with them in determining the compensation for the proposed taking. The plaintiffs later withdrew that claim during the hearing. The plaintiffs claim that the court improperly admitted certain evidence concerning the fair market value of their properties on the basis of the defendants' assertions that the evidence was relevant to defend the claim of failure to negotiate. The plaintiffs argue that the evidence was irrelevant and that the court should have excluded it.

The plaintiffs also argue that the court improperly admitted into evidence certain testimony concerning the prior mediation between the parties, which was used to determine the fair market value of the property. The

plaintiffs cite the long-standing evidentiary rule that mediation and settlement discussions are generally not admissible at trial. See Connecticut Code of Evidence § 4-8 (2000).

The plaintiffs argue that those evidentiary rulings prejudiced them because they could have led "the court to believe that the plaintiffs were fighting over merely money." They further claim that the admission of that evidence "improperly placed the focus on what the property was worth and what the plaintiffs believed it was worth."

We review these claims in accordance with a well established standard of review. "[A] trial court may exercise its discretion with regard to evidentiary rulings, and the trial court's rulings will not be disturbed on appellate review absent abuse of that discretion. . . . In our review of these discretionary determinations, we make every reasonable presumption in favor of upholding the trial court's ruling. . . . Evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the [appellant] of substantial prejudice or injustice." (Citation omitted; internal quotation marks omitted.) *Cafro* v. *Brophy*, 62 Conn. App. 113, 127, ___ A.2d ___ (2001).

Furthermore, a party seeking a new trial because of an improper evidentiary ruling has "the burden of demonstrating that the error was harmful. . . . When determining that issue in a civil case, the standard to be used is whether the erroneous ruling would likely affect the result." (Internal quotation marks omitted.) *Washington* v. *Christie*, 58 Conn. App. 96, 100, 752 A.2d 1127, cert.

denied, 254 Conn. 906, 755 A.2d 884 (2000). The party "is entitled to relief from an erroneous ruling on the admissibility of evidence only if the error is also harmful. . . . [T]he plaintiff [bears the] burden of demonstrating that the erroneous ruling was likely to affect the result of the trial." (Citation omitted.) *Chouinard* v. *Marjani*, 21 Conn. App. 572, 577, 575 A.2d 238 (1990).

After reviewing the record and the court's memorandum of decision, we conclude that the plaintiffs have failed to demonstrate that the evidentiary rulings in any way affected the outcome of the trial. Although the evidence concerning the fair market value of the property appears to have been relevant to the issue of why the city needed to acquire all of the plaintiffs' land and the evidence concerning the mediation efforts appears to have been elicited prior to the plaintiffs' withdrawal of their claim concerning the city's failure to negotiate, we need not reach the issue of whether the court properly admitted the evidence because those evidentiary matters were not material to its decision. The plaintiffs' assertions that the evidence may have lured the court into believing that the dispute centered on money does not satisfy their burden of demonstrating to this court that the rulings likely affected the result.[13]

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[13] The plaintiffs presented this court with three additional claims, namely, that the court improperly determined that (1) the harms alleged by the plaintiffs did not constitute serious or material injuries, (2) the plaintiffs would not suffer irreparable harm if an injunction did not issue and (3) the hardships to the defendants would outweigh the hardships to the plaintiffs if the court granted the injunction. While the court addressed those issues in its memorandum of decision, it did not need to do so.

The judgments are affirmed.

In this opinion the other judges concurred.

The issue before the court was whether it should grant the injunctive relief requested. The plaintiffs claimed, essentially, that the defendants impending taking was violative of state law and of the federal and state constitutions. Once the court resolved those issues in favor of the defendants, its analysis was complete.

DOCKET NO. CV98-0488051S	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF NEW BRITAIN
FRANK W. BUGRYN, JR., ET AL	:	AT NEW BRITAIN
VS.	:	JANUARY 31, 2000
CITY OF BRISTOL ET AL		
DOCKET NO. CV98-0495681S	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF NEW BRITAIN
CITY OF BRISTOL		
VS.	:	AT NEW BRITAIN
FRANK W. BUGRYN, JR., ET AL	:	JANUARY 31, 2000
DOCKET NO. CV99-0495682S	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF NEW BRITAIN
CITY OF BRISTOL		
VS.	:	AT NEW BRITAIN
FRANK W. BUGRYN, JR.	:	JANUARY 31, 2000

MEMORANDUM OF DECISION

(Filed Feb. 1, 2000)

INTRODUCTION

The plaintiffs, Frank W. Bugryn, Jr., Nellie Fillipetti, Mary Dudko, Michael Dudko and John Bugryn[1] brought

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[1] Technically, the city is the plaintiff in two of the cases in which the city filed statements of condemnation for the two properties located at 299 and 269 Middle Street, Bristol, Connecticut, docket numbers 4956981 [sic] and 495682,

this action against the defendant, city of Bristol (the city), to restrain the city and its duly authorized municipal agencies, the Bristol Developmental Authority and the Bristol Planning Commission, from taking, in the name of the city, their properties located in the State Route 229 corridor of Bristol for the construction of an industrial park facility pursuant to the Economic Development and Manufacturing Assistance Act of 1990, General Statutes § 32-220, et seq. The homeowners seek temporary and permanent injunctive relief in their complaint on the ground that a taking of the homeowners' property under the current circumstances is not for a public use and that the actions taken by the city and the Bristol Development Authority were illegal, arbitrary and an abuse of public trust. After the city filed statements of compensation on the two properties, the homeowners filed motions for temporary and permanent injunctions in those cases. In their motions, the homeowners seek to either stay the proceedings and restrain the city from recording the certificates of taking or restrain the city from taking possession of the property due to following reasons: (a) the acquisition of property is not for a public purpose; (b) the acquisition is not for the purposes stated in the notice dated May 25, 1999; (c) the acquisition of all the property is not necessary for its redevelopment plan; (d) the city failed to make reasonable efforts to negotiate with the

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respectively. For convenience sake, this court will refer to the homeowners of the aforementioned properties as being the plaintiffs in all of the cases, even in the two condemnation cases commenced by the city. Exhibits marked during the course of this trial list the homeowners as being the plaintiffs and the city as being defendant.

homeowners in determining the compensation to be paid; and (e) the plaintiffs currently reside on property and are elderly.[2]

BACKGROUND FACTS

The origins of the matter at hand are lengthy and convoluted. The pertinent background facts are as follows: On May 21, 1998, the homeowners[3] made an application for temporary and permanent injunctions[4] in response to a final letter from the city advising the homeowners it was going to institute condemnation proceedings on the two properties if the homeowners did not accept its last offer for compensation.[5] Thereafter, the

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[2] In the homeowners' individual affidavits, filed with their motions on June 4, 1999, they list their ages as being the following: Frank W. Bugryn, Jr., 77; Nellie Fillipetti, 76; Mary Dudko, 74; Michael Dudko, 72; and John Bugryn, 64.

[3] Frank W. Bugryn, Jr. resides at 269 Middle Street. The remainder of the homeowners reside at 299 Middle Street.

[4] The homeowners filed a complaint, docket number 488051, requesting temporary and permanent injunctions restraining the city from taking any action to acquire homeowners' property located at 269 and 299 Middle Street, Bristol, Connecticut.

[5] The city, through Mayor Nicastro and Mr. Rosenthal, the Executive Director of the Development Authority, met and had discussions with various members of the Bugryn family beginning in October of 1996 to discuss the voluntary sale of the homeowners' properties to the city for use in the development of the Southeast Bristol Mini-Industrial Park. The city continued to make attempts to contact the homeowners to discuss acquisition while the industrial park plan was being developed, although the homeowners indicated that they were not interested in selling. The city made final settlement offers to

court, *Holzberg, J.*, issued an order to show cause for a hearing on the temporary injunctions to be held on June 8, 1998.[6] On December 12, 1998, during the pendency of the hearing for the temporary injunctions, the city filed an application for court-annexed mediation, which was granted on January 5, 1999, by the court, *Shortall, J.* In mid-April 1999, the parties met for several days with the court appointed mediator, but the matter remained unsettled.[7]

Thereafter, the city, pursuant to the statutory provisions of General Statutes § 8-129, filed two statements of compensation[8] for the homeowners' properties on May

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acquire the properties in letters dated May 15, 1998, addressed to Frank W. Bugryn, Jr. for the property located at 269 Middle Street and to Frank W. Bugryn, Jr., Michael and Mary Dudko, Nelli Fillipetti and John Bugryn for the entire 39.9 acres of the property located at 299 Middle Street.

[6] On June 8, 1998, the city filed a motion to dismiss the application for temporary injunctions for lack of ripeness because the city had not yet filed any statements of compensation. The city, however, dropped its motion after the city filed statements of compensation on the two properties on May 25, 1999.

[7] On the mediation report dated April 15, 1999, and filed with the court July 22, 1999, the mediator, *Satter, J.*, noted that the attorneys agreed but the plaintiffs could not face the thought of leaving their homes so they would not accept the defendant's offer of fair compensation.

[8] Docket number 495681 is the condemnation proceeding for the 32 acre parcel property, including a two story residential building, located at 299 Middle Street, Bristol, Connecticut. Pursuant to General Statutes § 8-130, the city deposited $1,200,000 with the clerk of the Superior Court.

Docket number 495682 is the condemnation proceeding for the approximately .3-acre parcel property, including a single

25, 1999.[9] As a concession to the Bugryn family, the city decided to leave the 8 back acres to the 299 Middle Street property with the homeowners,[10] even though the plan for the Southeast Bristol Mini-Industrial Park, approved by the Bristol Development Authority and City Council provides for the taking of the entire approximately 40 acres.[11] (See Plaintiffs' Exhibit C, current plan.) On June

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family residence, located at 269 Middle Street, Bristol, Connecticut. Pursuant to General Statutes § 8-130, the city deposited $90,000 with the clerk of the Superior Court.

[9] Prior to filing the statements for compensation, resolutions to adopt the current plan and acquire the homeowners' land by condemnation passed by unanimous vote at both the Bristol Development Authority and City Council, at two separate meetings, both held on March 25, 1999.

[10] Between 1993 and 1999 the city, through the Bristol Development Authority and the City Council, approved three project plans for the Southeast Bristol Mini Industrial Park. (See Defendant's Exhibits A through C, project plans.) The plan adopted January 7, 1998, was the first to include the homeowners' properties at 269 and 299 Middle Street, in their entireties. (See Defendant's Exhibit B, previous plan adopted January 1998.) The current plan dated October 1998 (see Defendant's Exhibit C, current plan adopted October 1998), which also includes both properties in their entireties, was amended by the Bristol Planning Commission at its regular meeting on March 25, 1998 (See Plaintiff's Exhibit 23, Minutes of Bristol Planning Commission, March 25, 1998). The amendment excludes from industrial development the back 8 acres of the 299 Middle Street property. (See Plaintiff's Exhibit 21, Amendment to Bristol Plan of Development, effective date April 13, 1998).

[11] Mr. Rosenthal testified that the city's plan is still in effect for the entire approximately 40 acres so designated as city action, but that for state purposes the 8 acre parcel is excluded. He further stated that for purposes of approval as a municipal

4, 1999, the homeowners filed motions for temporary injunctions in the two condemnation cases.[12] The city served notice pursuant to General Statutes § 8-129, and on June 9, 1999, filed the required record of notice with the clerk of the Superior Court. The homeowners filed a motion to consolidate on July 6, 1999,[13] and the three cases pending before this court[14] were consolidated for the purposes of hearing the motions for temporary

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development plan for the state the 8 acres are excluded from use, but not from acquisition.

[12] The homeowners' motions for injunctions included affidavits from each homeowner, as required by General Statutes § 52-471(b). These motions each requested two alternate claims for relief: (1) to stay the proceedings and restrain the recording of the certificate of taking; or (2) restrain the city from taking possession of the property due to the following reasons: (a) the acquisition of the property is not for a public purpose; (b) the acquisition of all the property is not for the purposes stated in the notice dated May 25, 1999; (c) the acquisition of all the property is not necessary for the city's redevelopment plan; (d) the city failed to make reasonable efforts to negotiate with the plaintiffs in determining the compensation to be paid; (e) the plaintiffs currently reside on the property and are elderly; and (f) no adequate remedy at law exists and irreparable harm will incur on the plaintiffs if an injunction is not issued.

[13] Also on June 9, 1999, the homeowners filed a motion to add Michael Dudko as a plaintiff on docket number 495681, granted on July 19, 1999 by the court, *Shortall, J.*, and a request to leave to amend their complaint together with an amended complaint. During trial, on October 6, 1999, the homeowners withdrew count four of their amended complaint.

[14] See supra, footnotes 4 and 8.

injunctions regarding the condemnation proceedings.[15] With the hearing action pending, the city refrained from taking any further steps under § 8-129.[16]

DISCUSSION

"An injunction is a harsh remedy . . . and when an equitable injunction is the specific relief claimed, it is incumbent upon the party seeking relief to allege facts showing irreparable damage and the lack of an adequate remedy at law." (Citation omitted; internal quotation marks omitted.) *Stoker v. Waterbury*, 154 Conn. 446, 449, 226 A.2d 514 (1967). " 'Adequate remedy at law' means a remedy vested in the complainant, to which he may, at all times, resort, at his own option, fully and freely, without let or hindrance." *Id.* "If the plaintiffs have an adequate remedy at law then they are not entitled to the injunction." *Id.*

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[15] Hearings on the application for temporary injunctions (docket number 488051) were marked over several times, due to scheduled negotiations, never having been heard prior to the city filing the statements of condemnation and the homeowners' subsequent motions for temporary injunctions in those two cases (docket numbers 495681 and 495682). Thereafter, several other hearing dates were marked over, including dates of June 21, 1999 and July 6, 1999, whereupon the cases were consolidated, and the motions were all heard as one proceeding commencing on or around September 26, 1999 and continuing through early October 1999.

[16] Namely, the proposed certificates of taking were not completed or filed by the court clerk following the city's return of notice filed on June 9, 1999; therefore, the city did not record any certificates of taking in the appropriate town clerk's office. See infra, footnote 19, General Statutes § 8-129.

The Economic Development and Manufacturing Assistance Act of 1990, § 32-220, et seq., expressly provides that the condemnation must be conducted in accordance with General Statutes §§ 8-128 to 8-133, the Redevelopment Act.[17] Sections 8-128 through 8-133 deal with the taking of land by redevelopment agencies.[18] Under § 8-129, title to the property and the right to immediate possession vest in the agency immediately upon the recording of the certificate of taking with the office of the town clerk in which the property is located.[19]

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[17] Redevelopment Act, General Statutes § 8-124, et seq.

[18] General Statutes § 8-128 provides, in part, that "[t]he redevelopment agency may acquire real property by eminent domain with the approval of the legislative body of the municipality and in accordance with sections 8-129 to 8-133, inclusive, and this section."

[19] General Statutes § 8-129 provides: "The redevelopment agency shall determine the compensation to be paid to the persons entitled thereto for such real property and shall file a statement of compensation, containing a description of the property to be taken and the names of all persons having a record interest therein and setting forth the amount of such compensation, and a deposit as provided in section 8-130, with the clerk of the superior court for the judicial district in which the property affected is located. Upon filing such statement of compensation and deposit, the redevelopment agency shall forthwith cause to be recorded, in the office of the town clerk of each town in which the property is located, a copy of such statement of compensation, such recording to have the same effect as and to be treated the same as the recording of a lis pendens, and shall forthwith give notice, as hereinafter provided, to each person appearing of record as an owner of property affected thereby and to each person appearing of record as a holder of any mortgage, lien, assessment or other encumbrance on such property or interest therein. . . . Not less than twelve days nor more than ninety days after such notice

Because the provisions of § 8-129 fail to provide the property owner with an opportunity to contest the taking, the plaintiffs are without an adequate remedy at law. See *Broadriver, Inc. v. Stamford,* 158 Conn. 522, 527, 265 A.2d 75, cert. denied, 398 U.S. 938, 90 S. Ct. 1841, 26 L. Ed. 2d 270 (1969).

The plaintiffs, however, must also show they will suffer irreparable harm if injunctions are not issued. "[I]rreparable harm arises when there exists no legal remedy furnishing full compensation or adequate redress for a wrong done to or sustained by an individual. The injury or wrong complained of must be serious or material and not adequately reparable by damages at law in that, such damages will not restore the complaining party to the position in which the party formerly stood." *Allshouse v. Farmer,* Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. 153327 (March 10, 1997) (*Tierney, J.*). "Although absolute certainty is not required,

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and such statement of compensation have been so served or so mailed and first published, the redevelopment agency shall file with the clerk of the superior court a return of notice setting forth the notice given and, upon receipt of such return of notice, such clerk shall, without any delay or continuance of any kind, issue a certificate of taking setting forth the fact of such taking, a description of all the property to so taken and the names of the owners and of all other persons having a record interest therein. The redevelopment agency shall cause such certificate of taking to be recorded in the office of the town clerk of each town in which such property is located. *Upon the recording of such certificate, title to such property in fee simple shall vest in the municipality, and the right to just compensation shall vest in the person entitled thereto.*

(Emphasis added.)

it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm." *Silitschanu v. Groesbeck*, 12 Conn. App. 57, 65, 529 A.2d 732 (1987), aff'd, 208 Conn. 312, 543 A.2d 737 (1988). "Whether damages are to be viewed by a court at equity as irreparable or not depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered." (Internal quotation marks omitted.) *Patry v. Board of Trustees*, 190 Conn. 460, 472, 461 A.2d 443 (1983).

Our Supreme Court has repeatedly held that "the issuance of an injunction rests within the sound discretion of the trial court." *Anderson v. Latimer Point Management Corp.*, 208 Conn. 256, 262, 545 A.2d 525 (1988). "An injunction is an extraordinary remedy which is not mandatory, but is left to the court's sound discretion even if there is a proper showing of irreparable harm." *Demers Exposition Services, Inc. v. Porter*, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. 466718 (September 12, 1995) (*Goldberg, J.*); see also *Gorra Realty, Inc. v. Jetmore*, 200 Conn. 151, 165, 510 A.2d 440 (1986) (such relief may be denied even when irreparable harm has been shown). "In exercising this discretion the trial court must balance the competing interests of the parties . . . and the relief granted must be compatible with the equities of the case." (Citations omitted; internal quotation marks omitted.) *Dukes v. Durante*, 192 Conn. 207, 225, 471 A.2d 1368 (1984). "[T]he exercise of discretion by the trial court [is] in light of the totality of the relevant circumstances." *Doublewal Corp. v. Toffolon*, 195 Conn. 384, 392, 488 A.2d 444 (1985). "Injunctive relief may not lie where it is predicated on the fears and apprehensions of

the party applying for it or where it would be incompatible with the equities of the case. . . . " (Citations omitted.) *Karls v. Alexandra Realty Corp.*, 179 Conn. 390, 402, 426 A.2d 784 (1980). "Where the granting of the injunction would cause damage to the defendant greatly disproportionate to the injury of which the plaintiff complains, it may be held inequitable to grant a mandatory injunction and the plaintiff may be remitted to her remedy by way of damages." *Moore v. Serafin*, 163 Conn. 1, 6-7, 301 A.2d 238 (1972); see also *Housing Authority v. Water Pollution Control Authority*, Superior Court, judicial district of New London at Norwich, Docket No. 3311 (April 19, 1996) (*Teller, J.*) (16 Conn. L. Rptr. 496) (a party seeking injunctive relief has the burden of showing a balancing of the equities in its favor over the hardships to the defendant). "Injunctions should not be issued when damages can adequately protect the injured party." *Harvey v. Daddona*, 29 Conn. App. 369, 377, 615 A.2d 177 (1992).

The plaintiffs requested temporary and permanent injunctions, by their complaint and by their motions in the condemnation cases. "A temporary injunction is a preliminary order of the court granted at the outset or during the pendency of an action, forbidding the performance of the threatened acts described in the original complaint until the rights of the parties respecting them shall have been finally determined by the court." *Deming v. Bradstreet*, 85 Conn. 650, 659, 84 A. 116 (1912). "The principal purpose of a temporary injunction is to preserve the status quo until the rights of the parties can be finally determined after a hearing on the merits." (Internal quotation marks omitted.) *Clinton v. Middlesex Mutual Assurance Co.*, 37 Conn. App. 269, 270, 655 A.2d 814 (1995); see

also *Gattoni v. Zaccaro,* 52 Conn. App. 274, 282, 727 A.2d 706 (1999).

Because a certificate of taking was not recorded, the condition of the parties has remained as it was before the commencement of any of the actions. Therefore, because the status quo has been preserved, temporary injunctions are no longer in issue. The homeowners, however, also requested permanent injunctions restraining the city from taking the properties.

"Permanent injunctions can be granted only after a final hearing on the merits and last indefinitely." 42 Am.Jur.2d, Injunctions § 9 (1969); see also *Doublewal Corp. v. Toffolon,* supra, 195 Conn. 391 (a court cannot issue a permanent injunction unless the pleadings are closed). "[T]he trial court does not have authority to render permanent judgments [injunctions] on pending claims where the pleadings are not yet closed." (Internal quotation marks omitted.) *Gattoni v. Zaccaro,* supra, 52 Conn. App. 281. Herein, a trial was held regarding the plaintiffs' claims; thus, consideration of permanent injunctions is proper.

I

IRREPARABLE HARM

This court has determined that the homeowners are without an adequate remedy at law, thereby meeting the first prong for the issuance of an injunction. The homeowners, however, must also meet the second prong by showing that they will suffer irreparable harm if injunctions are not issued. Here, the homeowners allege that

they are elderly, reside on the premises, have held these properties in their family for generations and that they do not want to leave their homes.

While this court is sympathetic to the homeowners' situation, this court, in its discretion, does not find the harms the homeowners allege constitute serious or material injuries. Also, this court does not find that there is a substantial probability that but for the issuance of the injunctions, the homeowners will suffer irreparable harm. However sympathetic the homeowners and their concerns might be, this court notes that injunctive relief may not lie where it is predicated on the fears and apprehensions of the parties applying for it.

The homeowners also claim federal and state constitutional rights violations due to the city's use of eminent domain allegedly to benefit a private individual or entity, thereby constituting an abuse of the public trust and a taking of privately owned property for a private purpose.[20] It is well established that the takings clause of the

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[20] The homeowners also claim the taking of their properties is not "necessary." Our Supreme Court has held that "[t]he determination of what property is necessary to be taken . . . in order to effectuate the public purpose is . . . a matter for the exercise of the legislative power." *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 146, 104 A.2d 365 (1954). "Necessary, in legislative acts . . . does not mean an absolute or indispensable necessity, but only that the taking provided for is reasonably necessary." (Internal quotation marks omitted.) *West Hartford v. Talcott*, 138 Conn. 82, 91, 82 A.2d 351 (1951). "When the legislature delegates the making of that determination [what property is necessary] to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse

Fifth Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment, and section 11 of Article First of the Connecticut Constitution provide protections against the taking of private property for public use[21] without just compensation.[22] "Authority to take by condemnation will be construed in favor of the condemnee and against the condemnor." *Torrington v. Coles*, 155 Conn. 199, 201, 230 A.2d 550 (1967). Our Supreme Court has held that the "public purpose is not affected by the agency's subsequent resale of the property to private redevelopers with the requirement, . . . [under the applicable statute effectuating the taking], that the land be used according to the redevelopment plan." *Fishman v. Stamford*, 159 Conn. 116, 125, 267 A.2d 443, cert. denied, 399 U.S. 905, 90 S. Ct. 2197, 26 L. Ed. 2d 560 (1970); see also *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 143, 104 A.2d 365 (1954). Furthermore, our Supreme Court has held that "where the public use which justifies

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of the power conferred." *Gohld Realty Co. v. Hartford*, supra, 141 Conn. 146. Because there is no evidence that the city's duly authorized municipal agencies acted with unreasonableness, bad faith or abuse of their power, this court may not further examine this claim.

[21] It is undisputed that "there is no right to condemn land for a private purpose." *Fishman v. Stamford*, 159 Conn. 116, 125, 267 A.2d 443, cert. denied, 399 U.S. 905, 90 S. Ct. 2197, 26 L. Ed. 2d 560 (1970).

[22] At trial, the homeowners testified that they did not believe the amount of compensation for the two properties is fair. That is not the issue before this court at this time. Subsequent to this trial, the homeowners filed appeals for review of the statements of compensation for the properties located at 269 and 299 Middle Street, docket numbers 498772 and 498773, respectively.

the taking of the area in the first instance exists, an element over which there is no controversy in the present case, that same public purpose continues even though the property is later transferred to a private person." *Broadriver, Inc. v. Stamford*, supra, 158 Conn. 533; see also *Gohld Realty Co. v. Hartford*, supra, 141 Conn. 143.

Even construing authority to condemn in the homeowners' favor, based on the evidence presented, this court finds the city's condemnation of the homeowners' properties is not in violation of any constitutional right. The evidence shows the city approached the homeowners with the intention to purchase their properties for the purpose of building an industrial park.[23] Although the city had numerous discussions with and made plans to have Yarde Metals as an anchor tenant in the proposed industrial park, no agreement or contract, written or oral, was made with Yarde Metals. Furthermore, and more telling, the evidence shows the city plans on developing the industrial park whether or not Yarde Metals indeed becomes a tenant. This court notes that even if Yarde Metals becomes the hoped-for anchor tenant, it will have to comply with the developmental plan as approved by the Bristol's Developmental Board and City Council. Therefore, this court finds that the homeowners' claims of constitutional right violations are without merit.

This court finds the homeowners do not meet the second prong alleging irreparable harm and this court finds that damages at law by way of fair compensation

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[23] The homeowners do not dispute that the development of an industrial park is a public use.

for their properties can adequately restore the homeowners. Even assuming, however, that the homeowners' allegations constitute irreparable harm or demonstrate a substantial likelihood thereof, granting the homeowners' requests for injunctions must be compatible with the equities of the case. In the following section, this court undertakes a review of the competing interests of the parties with particular focus on the hardships to the city should the homeowners' injunctions be granted. After balancing the equities, this court comes to the same conclusion that the homeowners' injunctions should be denied.

II

BALANCING THE EQUITIES

Although the issuance of an injunction rests within the sound discretion of this court, a "trial court must balance the competing interests of the parties . . . and the relief granted must be compatible with the equities of the case." (Citations omitted; internal quotation marks omitted.) *Dukes v. Durante*, supra, 192 Conn. 225. In particular, this court notes that a party seeking injunctive relief has the burden of showing a balancing of the equities in its favor over the hardships to the defendant. See *Housing Authority v. Water Pollution Control Authority*, supra, Superior Court, Docket No. 3311. This court recognizes that the hardships to the homeowners are that they are elderly, reside on the property which has been in their family for generations and that they do not want to leave

their homes. In contrast, this court recognizes the following hardships to the city if it were to grant the homeowners' injunctions: (a) no other suitable industrial properties in Bristol; (b) no bond posted by the homeowners; (c) the city's monies are tied up in deposits not earning interest; (d) an increased burden on the city's services if the homeowners' properties are developed residentially, as currently zoned; and (e) the need for new jobs in Bristol due to the city's high manufacturing unemployment rate and the large number of shutdowns and downsizings of companies in the last few years. These hardships to the city will each be addressed separately.

A. No Other Suitable Industrial Property in Bristol.

Our courts have consistently reaffirmed the principle that each parcel of real property is recognized to be in some way unique. See *French v. Clinton*, 215 Conn. 197, 200, 575 A.2d 686 (1990). The uniqueness of the homeowners' two parcels is precisely that which creates the conflict with the city. At the trial, the city provided evidence of the unique suitability of the two tracts of land, at 269 and 299 Middle Street, for industrial park development. Specifically, the city cites to the following as making the homeowners' properties uniquely suitable for the proposed industrial park: (1) direct access to Interstate 84 and other major routes; (2) adjacent location to an already existing industrial development allowing for combined development; (3) visibility of the proposed park from State Route 229 (Middle Street); and (4) city services already accessible. These aspects of suitability will be discussed separately.

1. Direct Access to Interstate 84 and Other Major Routes

Evidence was presented that the location of the homeowners' properties location on Middle Street (also known as State Route 229) provides direct motor vehicle access to Interstate Route 84. (See Defendant's Exhibit C, current plan, existing conditions; site description.) Access to Interstate Route 84 is critical because the city expects that proposed tenants at the industrial park will be involved in manufacturing, thereby utilizing large trucks. Evidence shows the homeowners' properties also have access to State Route 72, approximately one mile north and U.S. Route 6, approximately 2.2 miles to the north. Both these routes provide east-west access to the city of Bristol. State Route 229 provides north-south access to the homeowners' properties. The homeowners' properties are located approximately 3.5 miles from Interstate 84, as accessed via State Route 72. Interstate 84 provides east-west access for central and northern Connecticut.

Evidence shows that there are 290 industrial acres available in Bristol. Evidence shows some that [sic] of the 290 acres were given to the Nature Conservancy and that some land is currently in farm use. Although some of these other industrially zoned acres are of sufficient size to accommodate the city's proposed industrial park, evidence shows that none of these other parcels provide direct highway access. Testimony repeatedly reaffirms the city's need for highway access for the proposed industrial park tenants. None of the other 290 available acres zoned for industrial development in the city of Bristol provide such direct access to Interstate 84. This direct access alone

makes the homeowners' properties uniquely suitable for industrial development.

2. Properties Are Located Adjacent to an Already Existing Industrial Development

The homeowners' properties are located adjacent to property of a manufacturer, DANA/Warner Electric Company (formerly Superior Electric). The DANA/Warner Electric Company (DANA/Warner) property, which lies to the south of the homeowners' properties, is an industrial use property with room for expansion. DANA/Warner owns the adjacent industrial zoned property encompassing approximately sixty-eight acres. DANA/Warner is cooperating with the city allowing for combined development of approximately fourteen of its acres with the homeowners' properties. (See Defendant's Exhibit C, current plan.) The homeowners' properties are located in the southeast part of Bristol, one of the major industrial areas of the city where there is much development. There are no comparable quality parcels to the homeowners' properties when combined with DANA/Warner's parcel for purposes of development.

Also, evidence shows that the homeowners' properties, in combination with the DANA/Warner property, are of sufficient width and depth to provide adequate access for large trucks. Testimony reveals that the city expects to have tenants involved in manufacturing who will utilize large trucks for distribution. These trucks need adequate room to maneuver, and incoming, outgoing and handling sections are needed for these trucks. The homeowners' properties are uniquely suitable for

industrial development because they are located adjacent to an already existing industrial development with room for expansion of sufficient width and depth to provide adequate access for large trucks.

3. Visibility of the Proposed Park from Middle Street

Testimony shows that prospective tenants to industrial parks regard visibility of their expensive facilities as important, and that visibility is part of the total setting of the industrial park. The homeowners' properties front Middle Street, a four lane bi-directional principal arterial road. (See Defendant's Exhibit C, current plan, existing conditions.) There are visibility constraints to the north by approximately thirty single family homes and a well treed area. Testimony shows that taking the homeowners' properties and removing all the residential structures located along the Middle Street frontage provides for better, unimpaired visibility of the industrial park. Furthermore, testimony reaffirms the importance of frontage in creating an attractive and visible industrial park and increasing its marketability.

Also, the city is concerned with the present and future appearance of the property, including landscaping, and having control over the property in order to properly maintain its appearance. Currently the homeowner's properties are zoned residential. A ranch-style residential home rests on the approximately .3 acre plot at the 269 Middle Street location. Testimony shows that the residence at 269 Middle Street is currently in good condition. If this relatively small property is not taken along with

the 299 Middle Street property, there is evidence problems would arise with carving out a piece of the industrial park. Such problems include the city's need to provide adequate buffer zones because the state requires a fifty foot buffer zone around the industrial park. Buffer zones in turn implicate issues of landscaping and grading of the area. Zoning issues would also arise relating to nonconforming uses within the proposed industrial zoned area for the park.

The property at 299 Middle Street encompasses approximately forty acres in a long, narrow rectangular shape. There is a two story multi-family residence with a detached three car garage located directly at the Middle Street entrance; however, the majority of the property is utilized as a Christmas tree farm.[24] The city is proposing to take thirty-two acres of the property beginning at the narrow end of the rectangle shape of the property fronting Middle Street. (See Exhibit C, current plan; see also Exhibit G, aerial view photograph with overlay.) The house at 299 Middle Street is not in the best of conditions.[25] As with the other parcel, the 299 Middle Street frontage provides needed visibility to the proposed industrial park, and the same issues of appearance, control thereof and marketability of the park arise here. Visibility of the proposed park contributes to making the

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[24] Under Act 490, a forestry exemption, this use provides a substantial tax break on the property.

[25] The city, concerned with the appearance of the street entrance to its proposed industrial park, submitted eight photographs of the subject premises to show the condition of the structures on the homeowners' property at 299 Middle Street. (See Defendant's Exhibits H1 through H8, photos.)

homeowners' properties uniquely suitable for industrial development.

4. City Services Already Accessible

Evidence shows that both the homeowners' properties already have access to major utilities, including city water and sanitary sewers, storm sewers, gas, telephone and electric. (See Defendant's Exhibit C, current plan, existing conditions.) Therefore, the time involved and the costs to the city in developing the homeowners' properties are both substantially lessened. Also, the homeowners' properties are largely vacant, except for the two houses. The financial savings to the city by accessing already existing utilities on the homeowners' properties also contributes to making the homeowners' properties uniquely suitable for industrial development.

Because there is nothing comparable to the homeowners' properties within the city of Bristol and their properties are uniquely suitable for industrial development, as discussed above, it would be an inequitable hardship to the city if homeowners' injunctions are granted.

B. No Bond Posted by the Homeowners

In connection with their complaint (docket number 488051) and pursuant to General Statutes § 52-472, on June 1, 1998, the homeowners filed a request that the

court waive the requirement of bond for good causes.[26] Should the homeowners be granted injunctive relief, the city is left without compensation for its costs, except for the value of the property, the fate of which is the subject matter of this action. The lack of compensation for the city's costs presents an inequitable hardship to the city if the homeowners' injunctions are granted.

C. City's Monies Are Tied Up in Deposits Not Earning Interest

On May 25, 1999, the city separately deposited $90,000 and $1.2 million with the clerk of the Superior Court, as required by General Statutes § 8-129.[27] On September 29, 1999, motions for payment of deposit on the two properties were made and signed by attorneys for the city and the homeowners.[28] At trial, the city noted it has lost investment income on this money since May 25, 1999, because the money was removed from the city's

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[26] The homeowners made the request on the basis that the plaintiffs are elderly and of limited means and that the subject matter of the action is the real property upon which they all reside. The homeowners further asserted that such real estate is ample surety to answer all damages in case they fail to prosecute the action to effect.

[27] These funds are the city's fair compensation offers for the properties located at 269 and 299 Middle Street, respectively. See supra, footnote 8.

[28] The motions requested the monies for both properties be deposited in interest bearing accounts, with the monies to go to the record owner of the properties once these matters are resolved. This court determined that court policy holds a condemnation case is removed from the docket if the deposit is removed. Thereafter, these motions were abandoned.

coffers and the money is not in an interest bearing account. The city noted that even on a simple interest basis of approximately five percent, the city is losing approximately five thousand dollars per month on the deposited amount for the 299 Middle Street property alone. If the homeowners' injunctions are granted, the absence of the funds from the city's coffers with no acquisition to show for it and the loss of interest income present an inequitable hardship to the city of Bristol.

D. Increased Burden on City Services if Properties Developed Residentially

Testimony shows the majority of the 299 Middle Street property is used as a Christmas tree farm, which allows for reduced taxes. Taxes for the 299 Middle Street property (the house and the remaining approximately thirty-nine acres) are assessed at $2100 per year. The property as currently zoned allows for development of small, relatively inexpensive homes. Testimony shows that if the properties are developed as currently zoned, without a counterbalance of industrial development, there would be a net loss to the city because of costs of providing services, particularly schools. If the properties are developed under the proposed industrial zoning by building an industrial park, testimony shows the park would provide the city with acquisition monies from selling the park lots to private entities as well as provide the city with a substantial increase in tax base. If the homeowners' injunctions are granted, the city would suffer inequitable hardship by the increased burden on city

services if the properties are developed as currently zoned.

E. Need for New Jobs

Manufacturing employment has steadily declined in Bristol since 1979. The rate of decline from 1990 to 1996 was sixteen percent.[29] Unemployment rates in Bristol in the 1990s have been consistently greater than state and regional averages. (See Defendant's Exhibit C, current plan, employment overview.) Also, there have been many shutdowns and downsizings of companies since the 1970s, many in the last few years,[30] which decreased the number of manufacturing jobs in Bristol.

The Economic Development and Manufacturing Assistance Act of 1990[31] distinguishes between the level of funding that might be available for particular categories of cities and towns within the State based on their financial status. Under the Act, the city of Bristol qualifies as a "targeted investment community" because of its poverty criteria. The city of Bristol has an Enterprise Zone, so under the Act it is eligible for up to ninety

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[29] Statewide decline for the same period was nineteen percent.

[30] Mr. Rosenthal testified as to the loss of manufacturing employers in the city of Bristol. Specifically, he testified that the General Motors plant closed in 1995, wherein 500 jobs were lost, that Nestle closed its distribution facility with a loss of approximately 80 jobs, and that Barnes, a spring manufacturing company, had declined from 500 employees down to 300 employees.

[31] General Statutes § 32-220, et seq.

percent of funding from the State. Without this status, the maximum amount of funding the State could provide for the proposed industrial park project is fifty percent. Furthermore, the city of Bristol is a public investment community within the State of Connecticut because it is among the twenty-five percent poorest Connecticut towns.

Evidence shows the proposed industrial park would provide the city of Bristol with a needed increase in jobs and tax revenues. Evidence also shows the city currently has poverty status and that the Economic Development and Manufacturing Assistance Act could provide the city with a substantial boost in funding the proposed project. These factors, combined with the lack of other suitable industrial development property comparable with the homeowners' properties, would make it an inequitable hardship for the city if the homeowners' requests for injunctions are granted.

CONCLUSION

This court sympathizes with the homeowners' concerns over losing their homes; however, the fears and apprehensions of the parties applying for injunctive relief are not sufficient to constitute a showing of irreparable harm. This court does not find the disruption to the homeowners that the taking of their property would cause them evinces an irreparable injury. Furthermore, this court finds, based on the evidence submitted, that the homeowners' federal or state constitutional rights have and will not be violated by the taking of their property;

and as such, the homeowners have not made their requisite showing of irreparable injury if permanent injunctions are not issued.

Also, as discussed herein, this court finds, based on the evidence submitted, that the balancing of equities does not justify granting the homeowners injunctive relief over the hardships to the city of Bristol due to the unique suitability of the homeowners' properties for development as an industrial park and because the damage to the city by the granting of the injunctions would be greatly disproportionate to the homeowners' injuries. This court determines that just compensation for the two properties to be taken provides an adequate remedy for the homeowners. Therefore, the homeowners' requests for permanent injunctive relief are hereby denied.

/s/ Kremski, J.T.R.
Kremski, J.T.R.

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-00-0492

Frank W. Bugryn, Jr., et al. v. City of Bristol et al.
City of Bristol v. Frank W. Bugryn, Jr., et al.
City of Bristol v. Frank W. Bugryn, Jr.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the Frank W. Bugryn, Jr., John Bugryn, Nellie Fillipetti, Michael Dudko and Mary Dudko for certification to appeal from the Appellate Court (63 Conn. App. 98 [AC 20511], it is hereby ordered that said petition be, and the same is hereby denied.

Sullivan, C.J. did not participate in the consideration or decision of this petition for certification.

BY THE COURT,

/s/ Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: June 7, 2001
Notice sent: 6/7/01
Clerk, Superior Court, New Britain, CV98 488051/CV99 495681/CV99 495682
Clerk, Appellate Court
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Carmody & Torrance
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Bridget C. Gallagher in support of petition: Brian T. Henebry in opposition.

(2)

Supreme Court, U.S.
FILED
OCT 9 2001
CLERK

No. 01-407

In The

Supreme Court of the United States

FRANK W. BUGRYN, JR., MARY DUDKO, MICHAEL DUDKO, AND JOHN BUGRYN,

Petitioners,

v.

CITY OF BRISTOL, PLANNING COMMISSION OF THE CITY OF BRISTOL, AND THE BRISTOL DEVELOPMENT AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. If a municipality exercises its condemnation authority in such a manner that a specific and identifiable interest may benefit from the condemnation, do the Fifth and Fourteenth Amendments to the United States Constitution require the application of heightened scrutiny in determining whether the condemnation is being carried out for a public use?

2. If the answer to the first question is "yes," is heightened scrutiny warranted in this case where the trial court considered all the evidence regarding the circumstances surrounding the condemnation and concluded that the purpose of the taking was to develop a multi-lot industrial park that would proceed with or without the involvement of a particular private entity that never committed to purchasing one of the lots in the industrial park?

LIST OF PARTIES AND AFFILIATES

The names of all parties to the proceedings before the Connecticut Appellate Court appear in the caption of the case. Bristol is a city in the state of Connecticut. There are no corporate petitioners.

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OPINIONS BELOW

The order of the Connecticut Supreme Court denying the petitioners' petition for certification was issued on June 7, 2001, and is reported at 256 Conn. 927, 776 A.2d 1143 (2001). The opinion of the Connecticut Appellate Court is reported at 63 Conn. App. 98, 774 A.2d 1042 (2001). The opinion of the Connecticut Superior Court (Kremski, S.T.R.) dated January 31, 2000 is unreported. All three of these decisions are reprinted in the petitioners' appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Connecticut Supreme Court denied the petitioners' petition for certification on June 7, 2001. The Connecticut Appellate Court entered judgment on April 24, 2001. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). As outlined below in section four of the "Reasons For Denying The Writ," the respondents contend that this case is moot.

STATEMENT OF THE CASE

On May 25, 1999, the City of Bristol deposited $1.29 million in the Superior Court of Connecticut in order to commence condemnation proceedings with regard to two parcels of land owned by respondents that were being taken in connection with the City's plans to develop an industrial park. The Bristol Development Authority and

the Bristol City Council had previously voted unanimously to approve the project plan for the Southeast Bristol Mini-Industrial Park, which will include twelve-fifteen industrial lots.[1] Prior to obtaining these approvals, the Project Plan had been the subject of multiple public hearings and had been reviewed and approved by the Bristol Planning Commission, the Central Connecticut Regional Planning Agency, and numerous state agencies.

As required by C.G.S. § 32-224(b)(12), the City Council and the Bristol Development Authority specifically found as part of the approval process that the land and buildings within the boundaries of the project area will be used "principally for manufacturing or other economic base business purposes or business support services" and that the project will contribute to the economic welfare of the City of Bristol and the State of Connecticut. According to the Project Plan prepared by an independent consultant, the net present value of the excess of tax revenues over the estimated cost of development is approximately $8.9 million. The Project Plan also states that after 10 years the industrial park will create between 396 and 594 jobs for the City.

The City of Bristol ranks in the top 25% of Connecticut's poorest towns. It is considered an economically disadvantaged community and a "targeted investment community" under Conn. Gen. Stat. § 32-222(u). Like many of the old manufacturing towns in the Northeast,

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[1] Under the project plan, the two parcels owned by petitioners will be subdivided into four industrial lots.

manufacturing employment in Bristol has declined steadily over the years. The number of manufacturing jobs in the city declined in part as a result of several plant shutdowns that occurred beginning in the 1970s. The unemployment rates in Bristol in the 1990s were consistently greater than the state and regional averages.

The petitioners filed an action to enjoin the takings in the Connecticut Superior Court. The petitioners' principal claim was that the taking was designed to benefit a private entity (Yarde Metals). In the proceedings below, the petitioners never challenged the constitutionality of Conn. Gen. Stat. §§ 32-220 et seq., the Connecticut Economic Development and Manufacturing Assistance Act of 1990 ("the Act"), under which these condemnation actions were brought. Moreover, petitioners did not dispute that: (1) one of the purposes of the Act was to promote the development of industrial parks; (2) an industrial park developed under the Act is a public use; (3) the respondents complied with all necessary procedures required for exercising the power of eminent domain under the Act; and (4) the Bristol City Council and Bristol Development Authority made the necessary factual findings required under Conn. Gen. Stat. § 32-224(b)(12), including a finding that the industrial park will contribute to the economic welfare of the city and the state.

After hearing four days of testimony from petitioners, the mayor of the City of Bristol, the director of the Bristol Development Authority, and the president of Yarde Metals, the trial court denied the injunctive relief requested. This testimony focused on the origins of the project, the reasons why the City sought to develop the

industrial park, whether the City's primary purpose was to provide a benefit to Yarde Metals as alleged by petitioners, and whether the project would proceed even if Yarde Metals elected to relocate elsewhere.[2] The trial court rejected petitioners' claim that the purpose of the taking was to benefit Yarde Metals, noting that Yarde Metals' involvement in the project remained in doubt and finding that the City intended to proceed with the industrial park with or without Yarde Metals.

The Connecticut Appellate Court affirmed the trial court's ruling in a unanimous decision, and the Connecticut Supreme Court subsequently denied certification of the same issue the petitioners are now asking this Court

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[2] The mayor of Bristol and the director of the Bristol Development Authority testified that they always intended to proceed with the project whether or not Yarde Metals elected to relocate to the industrial park. Craig Yarde, the president of Yarde Metals, testified that, although he was interested in relocating to the industrial park, he had never committed to the City – contractually or otherwise – to purchase one of the lots because: (1) he had been looking to relocate since 1996 in order to eliminate the costs of operating out of multiple facilities, and the delays and uncertainties occasioned by this litigation had caused him to look for sites elsewhere; (2) until the litigation was ultimately resolved and the City's ownership was beyond dispute, Mr. Yarde could not know the configuration of the land the City could sell and whether the land that was ultimately available would meet his company's expansion needs at that time. In addition to Yarde Metals, the City received a number of inquiries from other companies interested in relocating to this industrial park. The director of the Bristol Development Authority testified regarding his efforts to market the industrial park to companies located throughout the Northeast and Mid-Atlantic regions.

to review.[3] *Bugryn v. City of Bristol*, 63 Conn. App. 98, 774 A.2d 1042, *cert. denied*, 256 Conn. 927, 776 A.2d 1143 (2001). Additional facts relating to the respondents' claim that this case is moot are set forth in section four below.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Fifth and Fourteenth Amendments to the United States Constitution require "heightened scrutiny" in determining whether a condemnation is being carried out for a public use if the condemnation power is exercised in such a manner that a specific and identifiable private interest may benefit. This contention is contrary to numerous decisions of this Court and would thus require the outright reversal of long-settled precedent of this Court. In fact, there is not a single federal court decision that supports petitioners' claim. The petitioners seek review based upon the decisions of the highest courts in two states that appear to disregard the fact that the "heightened scrutiny" standard sought by petitioners arose out of state constitutional law in Michigan. Moreover, the petitioners' claim is based upon a factual predicate that the trial court rejected in its fact-bound decision after fully considering all the evidence

[3] The three-member panel of the Appellate Court included Justice Ellen Peters, former Chief Justice of the Connecticut Supreme Court. Prior to her service on the Connecticut Supreme Court, Justice Peters was a professor at Yale Law School from 1956 to 1978. The respondents incorporate by reference the facts set forth in the decisions of the Appellate Court and the trial court, which are included in the Appendix to the Petitioners' Brief.

presented by petitioners regarding the public use issue. The trial court's inquiry into all the facts and circumstances surrounding the condemnation satisfied even the "heightened scrutiny" that petitioners advance. Finally, the issue raised by petitioners is moot because their claim for heightened scrutiny is based upon an alleged benefit to Yarde Metals, and Yarde Metals purchased an industrial plant in another town while this case was on appeal and thus will not be relocating to the Southeast Bristol Mini-Industrial Park. The petition is without merit and should be denied.

1. The Petitioners' Claim Is Contrary To Decisions Of This Court And Is Unsupported By Any Federal Case Law.

The most striking aspect of petitioners' brief is the absence of a single citation to a federal court decision supporting their claim. The reason for this pregnant omission is simple: this Court has long held that the role of courts in reviewing a claim that a particular exercise of the condemnation power does not serve a public use is a limited one. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (holding that Court will not strike down a condemnation based upon the public use requirement so long as the taking is "rationally related to a conceivable public purpose," in rejecting private railroad's challenge to condemnation of its property by Interstate Commerce Commission for benefit of Amtrak); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) ("[t]he role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow."); *Hawaii Housing Authority v.*

Midkiff, 467 U.S. 229, 240-41 (1984) (the scope of the public use requirement is "coterminous with the scope of a sovereign's police powers" and the judiciary should defer to legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one"); *see also Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1157-58 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 168 (1998) (rejecting claim that city land reform ordinance violated public use requirement and holding that minimum scrutiny test set forth in *Midkiff* applied rather than heightened scrutiny sought by landowners). Thus, despite the relative frequency with which challenges to the eminent domain power are based upon claims that no public use is served, no federal court has ever adopted the heightened scrutiny test proposed by petitioners. This speaks volumes about the merits of petitioners' claim.[4]

In *Hawaii Housing Authority v. Midkiff*, wherein this Court first held that the public use requirement is coterminous with the scope of the police power, the Court

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[4] This Court has also repeatedly held that it regards with great respect judgments of state courts as to what constitutes a public use, and such judgments should be upheld unless clearly without ground. *See Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706 (1923); *Union Lime Co. v. Chicago & N.R. Co.*, 233 U.S. 211 (1914); *see generally Annotation*, "Eminent Domain – Public Use," 81 L.Ed.2d 931, § 3, at 937-39, and cases cited therein.

upheld the constitutionality of a land reform statute that authorized the use of eminent domain for the specific purpose of transferring the property to another private entity. 467 U.S. at 239-245. The court held that:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even where the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. . . . In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use, 'unless the use be palpably without reasonable foundation.' . . .
>
> To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

Id. at 240-41.[5]

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[5] While *Berman* and *Hawaii Housing Authority v. Midkiff* involved challenges to the constitutionality of a statute, the standard of review set forth in these cases and their progeny is equally applicable to legal challenges to particular exercises of a legislatively-delegated condemnation power by federal or local agencies. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. at 422-423 (applying *Midkiff* deferential standard to a challenge to a condemnation by Interstate Commerce Commission for benefit of Amtrak pursuant to eminent domain

The only federal court that has specifically addressed petitioners' argument soundly rejected it. In *AMSAT Cable Ltd. v. Cablevision Ltd. Partnership*, 6 F.3d 867, 875 (2nd Cir. 1993), the Second Circuit stated:

> Plaintiffs rely on a case applying a Michigan Constitutional test requiring a "clear and significant" showing that a condemnation statute that serves private interests is predominantly directed toward serving public interests. *City of Lansing v. Edward Rose Realty, Inc.*, 192 Mich. App. 551, 481 N.W.2d 795 (Mich. App.), *aff'd*, 442 Mich. 626, 502 N.W.2d 638 (Mich. 1993) (discussing state and federal standards). However, the federal standard is otherwise. As stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984), the exercise of eminent domain power will be upheld where it is "rationally related to a conceivable public purpose. . . . "

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power under 45 U.S.C. § 562(d)); *Small Landowners v. City and County of Honolulu*, 832 F.Supp. 1404, 1409 (D. Hawaii 1993), *aff'd, Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) (judicial deference given to legislative findings of public use is equally applicable to findings of municipality required as conditions for exercise of eminent domain power, citing *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979)). In the present case, both the Bristol Planning Commission and the Bristol City Council were required under Conn. Gen. Stat. § 32-224(b)(12) to find, prior to authorizing the condemnation, that "the land and buildings within the boundaries of the project area will be used principally for manufacturing or other economic base business purposes or business support services" and that "the project will contribute to the economic welfare of the City of Bristol and the State of Connecticut."

Id. at 875. Respondents have been unable to find any other federal decisions that discuss the decisions of the Michigan, Delaware, and New Jersey courts relied upon by petitioners in support of their claim for "heightened scrutiny." The reason for the dearth of federal case law on this issue is clear: "heightened scrutiny" is contrary to every decision of this Court addressing the issue.

The petitioners' claim that federal law is unclear as to the degree of scrutiny required where there is a *direct* benefit to a specific and identifiable private entity (as opposed to *some* benefit) is patently incorrect. In numerous cases addressed by this Court there was clearly a *direct* benefit to a private entity as a result of a taking, but the court applied a deferential standard in reviewing the public use issue. In *National Railroad Passenger Corp., Midkiff* and *Berman*, the condemnation resulted in the transfer of ownership from one private party to another, and this Court applied the same test: whether the taking is rationally related to a conceivable public purpose. *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. at 422 (ICC condemned railroad property to be transferred to Amtrak, a private corporation); *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 240-43 (land reform legislation resulted in transfer of condemned property to private owners in order to address land oligopoly); *Berman v. Parker*, 348 U.S. at 32-34 (where redevelopment statute allowed property taken to be transferred to private redevelopers, Court held that "[w]e cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects"). In all of these cases, there was a substantial and direct benefit to the private party who ultimately

acquired the condemned parcel, and the Court applied the same deferential standard of review in each case.

The petitioners provide absolutely no explanation or delineation between condemnations that provide *some* benefit, as opposed to those that provide a *direct* benefit, to a private entity. This is simply a meaningless distinction that represents an attempt to create confusion in the case law where there is none. Heightened scrutiny for any compensated taking would be directly contrary to the rulings in *Berman, Midkiff,* and their progeny.[6] Under the petitioners' approach, any taking that contemplated the ultimate transfer of the condemned property to a private entity (whether for purposes of economic development or any other purpose) would provide a direct benefit to that entity and would therefore have to be reviewed under heightened scrutiny. Such an approach would require the reversal of well-established precedent and result in the invalidation of scores of state and federal economic development statutes.

This Court has made it clear that the mere fact that a particular taking may have some incidental benefit to a private entity does not invalidate the taking. *See Joslin Mfg. Co. v. Providence,* 262 U.S. 668 (1923); *2A Nichols on Eminent Domain* (3rd Ed.), § 7.03[5][a] at p. 7-46.

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[6] The petitioners' claim that different levels of scrutiny can be applied to "public use" challenges in much the same manner that different levels of scrutiny are applied to claims under the Equal Protection Clause. Petitioners' Brief at 15-16. This argument ignores the fact that *Midkiff* established that the public use requirement of the Taking Clause is coterminous with a sovereign's police powers. There is no case law that would support applying different levels of scrutiny in this context.

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.' . . . '[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.'

Hawaii Housing Authority v. Midkiff, 467 U.S. at 243-44 (internal citations omitted). If the purpose of the taking is primarily to serve a public benefit, then that same public use continues after the property is transferred to a private entity. *International Paper Co. v. United States*, 282 U.S. 399, 408 (1931). The operative issue, therefore, is whether the purpose of the taking is to serve a public benefit. This inquiry is inherently fact specific. As discussed in section 3 below, this factual issue was addressed in detail by the trial court, which rejected petitioners' claim that the primary purpose of the taking at issue was to benefit a private entity (Yarde Metals). (*See* Trial Court Decision in Petitioners' Appendix at App. 35).

2. Petitioners' "Heightened Scrutiny" Claim Is Grounded In State Constitutional Law.

As discussed above, there is absolutely no support in any federal decisions for the "heightened scrutiny" standard advanced by petitioners. The petitioners' argument is based upon decisions of the Michigan and Delaware

Supreme Courts that purport to apply heightened scrutiny to public use claims where a taking results in a benefit to a specific and identifiable private entity. *See City of Lansing v. Edward Rose Realty*, 442 Mich. 626, 638-39, 502 N.W.2d 638 (1993), *citing Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 634-35, 304 N.W.2d 455 (1981); *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d 227, 231 (*citing Poletown*). A brief review of these decisions demonstrates, however, that the origin of the "heightened scrutiny" standard lies in state constitutional law first enunciated by the Michigan Supreme Court in the *Poletown* case. The test appears to have been applied by the Delaware Supreme Court (and by subsequent decisions of the Michigan Supreme Court) in cases involving federal constitutional issues without any discussion or analysis of whether the test is consistent with federal law. *See id.*

The "heightened scrutiny" standard relied upon by petitioners originated in the 1981 decision of the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit, supra.*[7] Significantly, *Poletown* did not involve any federal constitutional issues. Rather, the sole constitutional issue in that case was whether the taking of a large tract of land by the Detroit Economic Development Council for subsequent conveyance to General

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[7] The respondents are unaware of a single decision prior to *Poletown* discussing or applying heightened scrutiny to a public use issue. Moreover, respondents were unable to find a single federal court decision that has cited *Poletown*, although the heightened scrutiny standard adopted in Poletown has been discussed and rejected by the Second Circuit. *See AMSAT Cable Ltd. v. Cablevision*, 6 F.3d 867, 875 (2nd Cir. 1993).

Motors for an assembly plant constituted a taking for a private use in violation of Article 10, § 27 of the Michigan Constitution. 410 Mich. at 628-29. In announcing the "heightened scrutiny" standard it was applying, the Court cited no authority – state or federal – in support of this test. *Id.* at 634-35. The *Poletown* court ultimately affirmed the trial court's factual determination that the public interest was the predominant interest being advanced and therefore held that the taking was valid. *Id.*

In subsequent decisions, the Michigan Supreme Court has applied the *Poletown* "heightened scrutiny" test in cases involving (unlike *Poletown*) both state and federal constitutional claims regarding the public use issue. *See City of Lansing v. Edward Rose Realty*, 442 Mich. at 638-39; *Tolksdorf v. Griffith*, 464 Mich. 1, 9, 626 N.W.2d 123 (2001). However, in neither of these cases did the court ever expressly address the question of whether the *Poletown* test is inconsistent with federal law, nor did the court discuss the state constitutional roots of the test. Similarly, the Delaware Supreme Court adopted the *Poletown* "heightened scrutiny" test without discussing or noting that *Poletown* was based on state constitutional law. *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d at 231. Moreover, in *Wilmington Parking Authority* the court never even discussed whether the *Poletown* test is inconsistent with federal law. The only court that has actually addressed *Poletown's* roots in state constitutional law concluded that the "heightened scrutiny" test is

contrary to federal law.[8] *See AMSAT Cable Ltd. v. Cablevision Ltd. Partnership*, 6 F.3d at 875.

The conflict between the highest appellate courts in Connecticut, Michigan, and Delaware is therefore not a significant conflict warranting the review of this Court because: (1) the Michigan and Delaware decisions are clearly contrary to federal law; (2) the conflict arose not from a reasoned analysis of federal law but rather from the borrowing of a test that has its origins in state constitutional law; (3) the Michigan and Delaware courts never even considered or evaluated how the *Poletown* test compares to the standard of review applied by federal courts following *Midkiff*.[9]

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[8] In addition to the decision of the Connecticut Appellate Court, at least one other state court has rejected "heightened scrutiny" in the context of a public use challenge to a condemnation, but it did not expressly discuss the state constitutional origin of the *Poletown* test. *See Minneapolis Comm. Dev. Agency v. Opus Northwest, LLC*, 582 N.W.2d 596, 599 (Minn. Ct. App.), *review denied*, 1998 Minn. LEXIS 779 (1998) (holding that heightened scrutiny is contrary to both the national trend and Minnesota precedent); *cf. Acco Unlimited Corp. v. City of Johnston*, 611 N.W.2d 506 (Iowa 2000) (in equal protection challenge to condemnation, property owner conceded that heightened scrutiny did not apply because claim did not involve a fundamental right or suspect classification).

[9] The petitioners' reliance upon decisions from New Jersey and Indiana is misplaced. *See* Petitioners' Brief at 13 n.9. As petitioners concede, the New Jersey Supreme Court's only statement on this issue has been in dicta. *See City of Atlantic City v. Cynwyd Investments*, 148 N.J. 55, 73, 689 A.2d 712 (1997). Moreover, neither of the New Jersey decisions cited by petitioners include any discussion or analysis of the *Poletown* test's origins in Michigan constitutional law, nor do they evaluate whether "heightened scrutiny" is contrary to federal

There is a second reason why the decisions of the Michigan and Delaware Supreme Courts do not, at least at this time, create a conflict that is worthy of the time and attention of this Court. Despite the appellation of "heightened scrutiny," one could question whether the *Poletown* test actually differs from the deferential "rational relation" test applied by federal courts under the *Berman/Midkiff* line of cases. If the Michigan and Delaware courts have truly adopted a "heightened scrutiny" standard (analogous to heightened scrutiny analysis under the equal protection clause), then it is clearly contrary to the decisions of this Court and review is not warranted for that reason. If, however, the *Poletown* court, through the use of the term "heightened scrutiny," simply meant that a trial court addressing a public use issue must consider any evidence that the stated purpose of the taking is pretextual, then the *Poletown* test is not true "heightened scrutiny" analysis and is consistent with federal law. Interpreted in this manner, the *Poletown* test is analogous to a rule of relevance in cases involving public

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law. *See id.*; *Township of West Orange v. 769 Associates, LLC*, 341 N.J.Super. 580, 583-84, 775 A.2d 657 (N.J. App. Div. 2001). Prior to the *Township of West Orange* decision, a New Jersey trial court held that the *Cynwyd* court had not embraced the "heightened scrutiny" standard, but rather simply reaffirmed the settled principle that a condemnation can be invalidated where the stated public purpose differs from the actual purpose of the taking. *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 346 (N.J. Law Div. 1998). Similarly, the decision of the Indiana Supreme Court in *Hawley v. South Bend, Dept. of Redevelopment*, 270 Ind. 109, 383 N.E.2d 333 (1978) is of little relevance here. As petitioners admit, the *Hawley* court did not adopt a "heightened scrutiny" standard.

use issues. Specifically, the *Poletown* test could be construed as simply meaning that where a party contests a taking on the ground that it is for a private benefit, not a public use, then the court must not merely "rubber stamp" the decision of the condemning authority, but must instead consider any evidence of the facts and circumstances surrounding the taking that would tend to show that the true purpose differs from the stated purpose. *Cf. Wilmington Parking Authority v. Land With Improvements*, 521 A.2d at 231 (discussing *Poletown* test and then stating that in reviewing projects where private parties may benefit, the trial court should examine any evidence of the "underlying purpose" of the condemnor); *Hawley v. South Bend, Dept. of Redevelopment*, 270 Ind. at 120 (court must consider all evidence regarding what is the principal use to be made of property). If the *Poletown* test simply means that evidence that a taking is truly for a private benefit must be considered if offered, then it is entirely consistent with federal law.[10]

These two alternative interpretations of the *Poletown* test are mutually exclusive. Either the *Poletown* test represents true heightened scrutiny and is therefore contrary to federal law, or it is simply a rule of relevance and thus there is not a true conflict between the decisions of the

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[10] Even applying a deferential standard of review, Connecticut courts have struck down takings where there was sufficient evidence that the stated purpose of the taking was pretextual. *See Avalonbay Communities, Inc. v. Orange*, 256 Conn. 557, ___ A.2d ___ (2001) (invalidating taking of land for purported purpose of developing an industrial park where real purpose was to prevent development of subject parcel for affordable housing).

highest courts in Connecticut, Michigan, and Delaware. Under either interpretation, the petitioners' writ should be denied. Moreover, the fact that neither the Michigan nor Delaware Supreme Courts specifically addressed the state constitutional origins of the *Poletown* test suggests that this conflict between state courts – if it is indeed a true conflict – has not been addressed with sufficient clarity by the state courts so as to warrant this Court's review of the issue at this time.

3. The Factual Predicate For The Petitioners' Claim Was Rejected By The Trial Court.

The writ should also be denied because the petitioners' entire claim rests upon a factual claim that was rejected by the trial court after thoroughly considering all the evidence offered by petitioners in support of their contention that the purpose of this taking was to benefit a local manufacturer named Yarde Metals, rather than to obtain the economic development benefits of job creation and an increased tax base. This was not a case where the trial court merely "rubber stamped" the decision of the City of Bristol to exercise the power of eminent domain without examining evidence regarding the origin and underlying purpose of the project. Rather, the trial court conducted several days of hearings at which the petitioners' counsel extensively questioned the director of the Bristol Development Authority, the mayor of the City of Bristol, and the president of Yarde Metals regarding petitioners' claim that the purpose of this taking was to benefit Yarde Metals. After hearing all this testimony and

reviewing the numerous documentary exhibits, the trial court found that:

> [a]lthough the city had numerous discussions with and made plans to have Yarde Metals as an anchor tenant in the proposed industrial park, no agreement or contract, written or oral, was made with Yarde Metals. Furthermore, and more telling, the evidence shows the city plans on developing the industrial park whether or not Yarde Metals indeed becomes a tenant. This court notes that even if Yarde Metals becomes the hoped-for anchor tenant, it will have to comply with the developmental plan as approved by Bristol's Developmental Board and City Council. Therefore, this court finds that the homeowners' claims of constitutional right violations are without merit.

(Trial Court Decision, Petitioners' Appendix at 35).

Even in the unlikely event this Court were to grant certification and ultimately adopt a "heightened scrutiny" test, it is hard to conceive how the analysis on remand would be any different from the thorough analysis of the public use issue conducted by the trial court. The petitioners cite no evidence on the "private/public" use issue that was excluded by the trial court, nor do they even attempt to explain how "heightened scrutiny" could change the trial court's factual findings in any manner. The simple truth is that the trial court, after conducting a detailed analysis of the petitioners' factual claims regarding the purpose of this taking, rejected their claim that the purpose of this industrial park was to benefit Yarde Metals. Having been unsuccessful in attempting to convince the trial court that the underlying purpose of the

industrial park at issue was to benefit Yarde Metals, the petitioners now raise this standard of review issue in this petition.

Moreover, even if this Court were to grant certification, the "heightened scrutiny" issue should not even be reached unless the trial court was clearly erroneous in determining that this taking was not designed to benefit Yarde Metals. In their petition for certification to the Connecticut Supreme Court, the petitioners expressly recognized that their "heightened scrutiny" claim was dependent upon a factual argument that the trial court rejected. Specifically, the petitioners asked the Connecticut Supreme Court to review the following two questions:

> A. When condemnation authority is exercised in such a manner that it is designed to benefit a specific and identifiable private interest, should the Court apply heightened scrutiny in determining whether the predominant interest being advanced is the public interest?
>
> B. If the answer to the preceding question is in the affirmative, did the Court err in failing to apply the strict scrutiny in the instant case.

(Petition for Certification to Connecticut Supreme Court at pp. 1-2). Noticeably absent from the petition for a writ of certiorari to this Court is any reference to the second question above, namely, whether there are sufficient facts in this record to establish that the trial court should have applied heightened scrutiny in this case. The trial court's factual findings that Yarde Metals never committed to the project, and that the industrial park would proceed with or without Yarde Metals, preclude the application of

heightened scrutiny here, even if this Court were to rule that it should apply in some circumstances.

The factual circumstances of the present case should be contrasted with those in the Michigan and Delaware cases where heightened scrutiny was applied. For example, in *Poletown*, the City of Detroit was condemning an entire neighborhood comprising a 465-acre tract for a single user – General Motors. *Poletown*, 410 Mich. at 636-37. In contrast, the Southeast Bristol Mini-Industrial Park will include twelve-fifteen lots to be occupied by multiple users. Moreover, unlike the present case, there was no issue in *Poletown* as to whether General Motors would purchase the site if the City acquired it, and there was no evidence that the City would have proceeded with the taking absent General Motors' involvement. Here, the trial court expressly found that Yarde Metals never committed to the industrial park and that the City planned to develop the park even without Yarde Metals' involvement as a tenant. (Trial Court Decision at Petitioners' Appendix 35). Similarly, in *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d 227 (1986), there was no evidence of any doubt that the private entity allegedly benefited would ultimately participate in the project, nor was there any evidence that the project would have proceeded without that entity's involvement.

In sum, the trial court's decision demonstrates that it engaged in the type of review that petitioners assert was necessary, namely, an inquiry into the facts and circumstances underlying this taking. Having considered this evidence carefully, the trial court rejected petitioners' factual claim that the respondents exercised the eminent domain power in order to directly benefit a specific and

identifiable private interest. The petitioners' request for this Court's review of the "heightened scrutiny" issue is therefore precluded by the factual rulings of the trial court.[11]

4. The Case Is Moot.

The final reason why the petition should be denied is that this case is now moot because of events that occurred while this matter was pending before the Connecticut Appellate Court. "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" as moot. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992); *Calderon v. Moore*, 518 U.S. 149, 150 (1996). The premise of the petitioners' entire case no longer exists because Yarde Metals ultimately decided to move its operations to another town in Connecticut due to the long delay caused by this litigation. Specifically, Yarde Metals purchased an existing industrial plant in the

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[11] Because the petitioners' claim is based upon the factual predicate that the City exercised "its condemnation authority in such a manner as to directly benefit a specific and identifiable private interest, the respondents have raised a second question for certification (should this Court grant certiorari on the issue raised by petitioners) as to whether this predicate finding exists here. Specifically, if the Court grants the petition, the respondents seeks certiorari on the issue of whether the record in this case warrants the application of heightened scrutiny given the trial court's findings that the purpose of the taking was to develop an industrial park that would proceed with or without Yarde Metals' involvement.

neighboring town of Southington, Connecticut in March of 2001 and thus will not be relocating to the Southeast Bristol Mini-Industrial Park. (During the trial, Yarde Metals' owner had testified that he had begun looking at industrial properties in other towns and had to move forward in the near future with a decision on relocation.)

The decision of Yarde Metals to relocate to another town renders this case moot because the only issue for which petitioners seek certification is whether the trial court should have applied heightened scrutiny to the public use issue due to the alleged involvement of Yarde Metals in this project. In the event that this Court were to grant certification and overrule the *Berman/Midkiff* line of cases, the most that petitioners could hope for is a remand to the Connecticut courts for a determination as to: (1) whether heightened scrutiny should be applied to the facts of this case; and (2) if so, whether the taking is valid under the heightened scrutiny test.

The outcome of such a remand is preordained and therefore this Court cannot provide petitioners with any practical relief. On remand, the petitioners would presumably offer evidence in support of their claim that Yarde Metals allegedly receives a direct benefit from this condemnation and therefore the taking is not for a public use. The respondents would then introduce evidence concerning Yarde Metals' relocation to Southington and Bristol's plans to proceed with the industrial park, thereby mooting petitioners' entire case. The very fact that the City of Bristol is still proceeding with the plans for development of this industrial park (despite the loss of Yarde Metals as a potential tenant) substantiates the trial court's factual finding that the purpose of this project was never

to benefit Yarde Metals, and that the project would go forward with or without the involvement of Yarde Metals.

The petitioners are well aware of Yarde Metals' relocation to Southington. The respondents are hard pressed to understand why petitioners have sought certiorari because petitioners simply will not be able to obtain the relief they ultimately seek – an injunction of the taking. The most the petitioners can obtain from this Court's granting of certification is a Pyrrhic victory requiring a remand whose outcome has already been determined. While the pursuit of such victories may be a noble endeavor, the petitioners have wholly failed to provide this Court with any reasons why it should address an argument that, in addition to being moot, is contrary to its long-settled precedent, does not represent a significant conflict among state courts, and relies upon a factual predicate that was rejected by the trial court.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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